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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-991

OTTER TAIL POWER COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (A. 27-46) is reported at 331 F. Supp. 54; its detailed findings of fact and conclusions of law (A. 47-130) are not officially reported.

JURISDICTION

The original judgment of the district court (A. 131-133) was entered on October 22, 1971. Appellant's timely motions for a new trial, or alternatively for revision of the findings of fact and conclusions

of law and for amendment of the judgment accordingly (A. 134-204), were denied on November 10, 1971, except that Paragraph V of the judgment was amended to provide that appellant would not be required under the judgment to furnish wholesale or wheeling service "except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission" (A. 205-206). The notice of appeal (A. 211) was filed on December 7, 1971, and probable jurisdiction was noted on May 22, 1972 (406 U.S. 944). This Court's jurisdiction is conferred by Section 2 of the Expediting Act, 15 U.S.C. 29. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651; *United States* v. *Philadelphia National Bank*, 374 U.S. 321.

QUESTIONS PRESENTED

1. Whether an electric power utility violates Section 2 of the Sherman Act, 15 U.S.C. 2, when, for the purpose of suppressing competition from proposed municipal distribution systems seeking to distribute power at retail in towns served by the utility, it refuses to sell such systems power at wholesale, it refuses to wheel power to them from other potential suppliers, it initiates or supports litigation for the purpose of delaying the establishment of municipal systems, and it invokes provisions in its transmission contracts with other power suppliers to deny the municipal systems access to those suppliers.

2. If so, whether Section 202(b) of the Federal

Power Act, 16 U.S.C. 824a(b), bars the federal courts from granting effective relief from such violations.

STATUTES INVOLVED

Sections 2 and 4 of the Sherman Act, as amended, 15 U.S.C. 2 and 4, provide as follows:

Section 2.

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4.

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pend-

ing such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Section 202 of the Federal Power Act, 16 U.S.C. 824a, provides in pertinent part:

(a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

STATEMENT

This is a direct appeal by the defendant in a government civil antitrust suit. The district court found that appellant, the Otter Tail Power Company ("Otter Tail"), an integrated electric utility, had attempted to monopolize and had monopolized the retail distribution of electric power in municipalities

within its service area, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. In an opinion (A. 27-46) and in detailed findings of fact and conclusions of law (A. 47-130), the district court determined that Otter Tail had sought to perpetuate its monopoly by attempting to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system. The principal means it employed were refusals to sell power at wholesale to proposed municipal systems in the communities where it had been retailing power; refusals to "wheel" power to such systems;[1] the institution and support of litigation designed to prevent or delay establishment of these systems; and the invocation of provisions in its transmission contracts with several other power suppliers for the purpose of denying the municipal systems access to other suppliers by means of Otter Tail's transmission system (A. 130). The judgment is designed to prevent further attempts to monopolize by these means (A. 46, 207-210).

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[1] Wheeling is the transfer, by direct transmission or displacement, of electric power from one utility to another over the facilities of an intermediate utility (A. 103-105). It differs from the wholesaling of power in that the intermediate firm does not acquire the electricity for resale. See *City of Paris* v. *Kentucky Utilities Co.*, 41 F.P.C. 45, 49.

I. THE FACTS

A. The Defendant.

Otter Tail is an investor-owned, integrated electric power utility which generates, transmits, and distributes electric power. It operates within an area which conforms generally with Federal Power Commission Supply Area No. 26,[2] located in western Minnesota, the eastern portion of North Dakota and a northeastern sector of South Dakota (A. 29-30, 47-49, 87; map following A. 1207). Its principal revenues are earned from the retail distribution of electricity within some 465 towns in its service area (A. 86). In addition to retail distribution, however, Otter Tail wheels power from the Bureau of Reclamation[3] and other utilities to customers it does not serve at retail, including 17 towns with their own distribution systems (A. 105-107); Otter Tail also sells power at wholesale to investor-owned utili-

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[2] Federal Power Commission Supply Areas are designated primarily for statistical purposes.

[3] The Bureau of Reclamation is an agency of the Department of the Interior engaged in land reclamation, flood control and irrigation through the construction of dams and reservoirs and water conveyance systems. As a part of these activities, the Bureau develops and sells hydroelectric power at its facilities. Except for minor direct sales to federal and state institutions (A. 1207), the power is sold at wholesale to investor-owned, cooperative and municipal utilities. By statute, 16 U.S.C. 825s, it is required to give preference to public bodies, including municipal systems. In the Otter Tail area, the Bureau wholesales power from hydroelectric plants in the Missouri River Basin Project. Otter Tail is among its customers (A. 111-118).

ties and to municipal systems to which it wheels power (A. 108-111).

In the towns where it distributes at retail, Otter Tail operates under municipally granted franchises which, under state law, are nonexclusive and limited to periods of 10 to 20 years (A. 30, 86-87). Otter Tail is generally the sole supplier of electricity at retail in these towns (A. 87).

Otter Tail is strong and growing. In 1970 its net generating capacity was 272,245 kilowatts and its transmission system consisted of 5,992 miles of lines of varying voltages. Through multiple interconnections with the Bureau of Reclamation and other electric systems, Otter Tail both bought power at wholesale and wholesaled or wheeled power to other systems (A. 48-49). In 1970 it sold approximately 1.3 billion kilowatt-hours ("kwh") of electricity to 104,316 customers (A. 48).[4] Otter Tail's annual revenues from the sale of power increased about 70 percent between 1960 and 1970, from $19.9 million to $34.2 million (A. 48), and are projected to continue to grow substantially (A. 125-126). Otter Tail has consistently earned a reasonable rate of return, and its rate of return compares favorably with those of other electric utilities in the country (A. 126). The utility's earnings per share of common stock rose from $1.16 to $1.88 between 1961 and 1970 (Tr. Vol. VII, pp. 37-38).

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[4] Of the 1.3 billion kwh sold by Otter Tail in 1970, 274 million, or about one-fifth, were purchased at wholesale from the Bureau of Reclamation (A. 49).

Otter Tail's electric load grows about 7 percent a year, due both to more intensive use of electricity by its existing customers and to the addition of new commercial and industrial customers (A. 124). In 1972, the company was expected to begin furnishing power to a pipeline pumping station under construction in the area, thereby increasing its total electric load by 25 percent (A. 124-125). Otter Tail will also have the opportunity in the future to wholesale additional power to the 17 municipal systems to which it presently wheels power from the Bureau of Reclamation, since the Bureau, which has no projected surpluses of power after 1977 and no new generating capacity scheduled for construction in the area (A. 116-117), will be unable to meet all of these systems' future needs (A. 125).

B. The Relevant Markets and Otter Tail's Dominant Position.

1. *The markets.* The relevant product market in this case is the distribution and sale of electric power at retail (A. 86, 129). The relevant geographic markets consist of each town in Otter Tail's service area on the one hand, and all such towns collectively on the other (A. 87, 129).

Each town in Otter Tail's service area generally can accommodate only one distribution system, and individual consumers within each town must purchase their electricity from the one local distributor. Each town thus constitutes a natural monopoly market for the distribution and sale of electric power at retail (A. 87). There is competition, however, for

the right to be the monopoly supplier within the local market, *i.e.*, for the entire retail load in a town (A. 89). Since each town is in effect a block of customers for retail distribution, the aggregate of towns in Otter Tail's service area is a distinct geographic market in which Otter Tail competes for the right to serve the towns at retail. The towns themselves, rather than individual customers, are thus the relevant units within this broader geographic market for computing market shares.[5]

The district court found that certain towns within Otter Tail's service area were not part of the relevant market (A. 88, 90). Towns served at retail by the Northern States Power Company, the only other investor-owned utility operating in the area (A. 90, 1202), were excluded since Otter Tail and Northern States do not compete for the right to distribute and sell electricity in the towns served by each other (A. 90).[6] Of the 615 remaining towns in the area, 465 are served at retail by Otter Tail, 45 by municipal systems and 105 by rural electric cooperatives (A. 88, 1203-1204). But rural electric cooperatives do not compete to serve at retail towns being served

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[5] Retail customers located outside of the towns, such as farms and other isolated loads, account for only a small fraction of total retail sales (less than 10 percent of Otter Tail's customers are located in rural areas (A. 86)). The district court excluded rural loads from the relevant market (A. 91).

[6] One reason for this lack of competition is the fact that Northern States considers its service area to be confined to those areas where it has distribution facilities (A. 90, 813-814).

by either Otter Tail[7] or municipal systems, since the cooperatives are barred by the Rural Electrification Act (7 U.S.C. 904) from borrowing federal funds to provide power to towns already receiving central station service.[8] The towns served at retail by Otter Tail and the municipal systems receive central station service (A. 88-89). Otter Tail, in turn does not generally attempt to obtain retail loads served by the cooperatives (A. 899). Thus, for purposes of this case the rural cooperatives are not a significant competitive factor in Otter Tails' service area and the 105 towns served by the cooperatives were excluded by the district court from the relevant markets.

In sum, the competition for the sale of electric power at retail in towns is generally for the right to serve the entire retail load within the corporate limits of a town and such competition is generally between Otter Tail and a proposed or existing municipal system (A. 89). The relevant markets for the purposes of this case, therefore, consist of each town served at retail by Otter Tail and the 510 towns, collectively, served at retail by Otter Tail and munici-

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[7] Since 1945, only three communities have transferred from Otter Tail to cooperatives. They did so when Otter Tail voluntarily sold the local systems there to the cooperatives because the communities were in isolated portions of Otter Tail's operating area and could obtain better service from the cooperatives (A. 88).

[8] Rural electric coperatives are also barred (7 U.S.C. 913) from serving towns with populations greater than 1500 persons; Otter Tail serves 28 such towns (A. 89).

pal systems; Otter Tail serves 465 or 91 percent of these towns (A. 88).

Otter Tail's policy is to acquire existing municipal systems and franchises in towns within its service area whenever it can economically do so (A. 123-124). Since 1947, it has successfully acquired the franchise in six towns served by municipal systems (A. 89-90, 124). On the other hand, in the 25 years between 1945 and 1970, there have been contests in twelve towns served by Otter Tail over proposals to replace it with municipal systems (A. 85). In only three of these, Elbow Lake, Minnesota, Colman, South Dakota, and Aurora, South Dakota, were municipal systems actually established (A. 86).

2. *Transmission.* Economies of scale and reliability considerations militate against the establishment of isolated generation and distribution facilities by small towns like those in Otter Tail's service area (A. 100). Proposed municipal systems, therefore, must arrange to purchase at wholesale all or part of the power they will distribute at retail. To make such purchases, the proposed systems must have access to existing transmission lines over which the wholesale power can be delivered, for it is not economically feasible for the communities to build new transmission lines over any substantial distances to connect with bulk power sources (A. 35, 99-101).

Electric power lines are generally divided into three classes: (1) bulk power supply lines, usually with voltages of 115 kilovolts ("kv") or more, for transmitting large quantities of electric energy over

long distances to principal load centers; (2) subtransmission lines, with voltages from 34.5 kv to 69 kv, for moving power from the bulk supply lines to points of local distribution; and (3) distribution lines, usually with voltages of 12.5 kv or less, for transmitting electricity from the subtransmission network to the ultimate consumer (A. 34-35, 91-92). Otter Tail developed the basic subtransmission system in its area (two-thirds of its 5,992 miles of electric lines are 41.6 kv subtransmission lines); as a result, no other investor owned utility has constructed any subtransmission lines in the area (A. 92-93).

The Bureau of Reclamation has high voltage bulk power supply lines but does not operate a subtransmission network. Instead it relies upon wheeling contracts with Otter Tail and other utilities to deliver power from its bulk power supply lines to its wholesale customers (A. 93-95). By utilizing existing subtransmission lines, the Bureau avoids unnecessary duplication of facilities, is able to supply power to towns to which it would not be economically feasible to construct new lines, and complies with the congressional directive, expressed in the Bureau's annual appropriation bills (the so-called "Keating Amendment"; see, *e.g.*, 65 Stat. 255, 66 Stat. 451, 85 Stat. 369), forbidding it to construct transmission facilities to serve its preference customers when wheeling arrangements can be negotiated (A. 93-94).

Finally, the transmission lines owned by rural electric cooperatives operating in Otter Tail's service area do not significantly affect Otter Tail's dominance

in subtransmission (A. 96). Rural electric cooperatives, organized to be eligible for loans under the Rural Electrification Act, 7 U.S.C. 901, *et seq.*, are generally of two types: distribution cooperatives, which sell power at retail to rural consumers; and generation and transmission cooperatives (often organized and operated by a group of distribution cooperatives), which generate or purchase bulk power and transmit or arrange for its transmission to distribution cooperatives (A. 96). The 38 distribution cooperatives in Otter Tail's area generally own only low voltage distribution lines which in most instances could not be used to supply power to proposed municipal utilities (A. 96-97). Six of the seven generation and transmission cooperatives in Otter Tail's area have entered into transmission and interconnection agreements with Otter Tail which provide for the exchange of wheeling services (A. 98). Five of these agreements provide that a party to the agreement need not wheel power for the other party to customers which the first party serves at retail (A. 98). As a result of the wheeling arrangements, it is unnecessary for the cooperatives to build additional transmission lines (A. 99). The lines owned by the seven generation and transmission cooperatives do not significantly cut into Otter Tail's dominant position in subtransmission (A. 97).

In summary, since neither other investor-owned utilities, the Bureau of Reclamation nor the rural electric cooperatives have substantial transmission facilities to wheel power to potential customers in

Otter Tail's service area, Otter Tail dominates the subtransmission of power in most of its area (A. 35, 92-97).

3. *Regulatory factors in the retail market.* Retail electric rates are not subject to regulation by the Federal Power Commission; its jurisdiction over electric utilities under Part II of the Federal Power Act, 16 U.S.C. 824, *et seq.*, is generally confined to interstate transmission, sales at wholesale and facilities used for such transmission and sales.[9] See 16 U.S.C. 824(b) and (d); 16 U.S.C. 824d(a). In the three States in which Otter Tail operates, only North Dakota requires electric utilities to file their rates with a state commission (A. 697-700). While most of Otter Tail's basic municipal franchises are silent with respect to rates, Otter Tail generally lodges its proposed rates with the town administrations (Hartl Dep., Oct. 5, 1970, pp. 17, 19).[10]

The wheeling of power in interstate commerce is presently subject to only limited federal regulation and cannot be regulated by the states at all. See *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83. In 1969, the Federal Power

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[9] In addition, Section 202 of the Act, 16 U.S.C. 824a, empowers the Commission under certain circumstances to compel the interconnection of facilities on either an emergency or permanent basis.

[10] Otter Tail has entered into municipal service agreements with some of its municipal customers under which it provides street light service, power for municipal pumping and similar services at agreed upon rates (Hartl Dep., Oct. 5, 1970, pp. 17, 22).

Commission disclaimed power to compel wheeling under Section 202(b) of the Federal Power Act. *City of Paris* v. *Kentucky Utilities Co.*, 41 F.P.C. 45.[11] However, under Section 205(c) of the Act, 16 U.S.C. 824d(c), all wheeling contracts must be filed with the Commission and are subject to its power to enforce the requirement of Section 205(a) that rates, charges, rules and regulations "for or in connection with the transmission or sale of electric energy" shall be just and reasonable. 16 U.S.C. 824d, 824e.

C. The Challenged Practices.

The practices challenged by the government in this antitrust suit do not involve the lawfulness of Otter Tail's initial acquisitions of its franchised retail monopolies, but only its methods of preventing the towns it served from establishing their own municipal systems when Otter Tail's franchises expired. The complaint charged Otter Tail with violating Section 2 of the Sherman Act, 15 U.S.C. 2, by seeking to suppress competition in order to preserve its monopoly over the retail distribution of electricity (A. 10, 13-14).

The evidence introduced at trial centered on events in several small towns—principally Elbow Lake, Minnesota (A. 50-61), Hankinson, North Dakota (A. 62-70), Colman, South Dakota (A. 71-78), and Au-

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[11] Under Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), the Commission has power to require wheeling as a condition to hydroelectric licenses and authorizations to use federal land for the construction of factilities. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17.

rora, South Dakota (A. 78-83).[12] In each of these communities, Otter Tail's franchise terminated and the citizens voted to establish a municipal distribution system.[13] In an attempt to maintain its position as the retail distributor in the communities, Otter Tail refused to agree to sell electric energy to the proposed systems at wholesale, refused to agree to wheel power from any other suppliers of wholesale energy, including suppliers with which it had wheeling contracts, and instigated or supported litigation for the purpose of delaying the financing of the systems. Otter Tail owned the only substransmission lines accessible to the distribution systems in Elbow Lake and Hankinson (A. 37-38, 97). Colman and Aurora had access to other transmission systems (A. 77-78, 83, 97), and in these towns Otter Tail relied chiefly upon litigation to maintain its position.

In two other towns—Finley, North Dakota, and Velva, North Dakota—Otter Tail succeeded in winning renewal of its franchises by the legitimate means of improving service prior to town elections in which

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[12] In 1970 the populations of the towns were as follows: Elbow Lake, 1,484; Hankinson, 1,125; Colman, 456; and Aurora, 237.

[13] The evidence fully described Otter Tail's efforts, both lawful and unlawful, to maintain its position. Accordingly, it included exhibits and testimony bearing on the political campaigns in the towns on the franchise issue (A. 260). But the complaint did not charge, and the district court did not find, any violation of the antitrust laws based upon Otter Tail's political activity. The court expressly recognized that political activity is not within the reach of the antitrust laws (A. 41).

proposed municipal systems were rejected (A. 83-85).[14]

1. *Otter Tail's refusals to sell at wholesale or to wheel power.* Before Elbow Lake and Hankinson voted to replace Otter Tail with municipal systems, Otter Tail informed the towns that it would not sell them power at wholesale or wheel power to them from other suppliers over its transmission system (A. 52-53, 62-63). Otter Tail's refusals to deal with these towns were based solely upon the fact that the proposed municipal systems would replace Otter Tail as the retail distributor of electricity in the towns (A. 38). Since it wholesaled and wheeled power to other municipalities, the company's refusals were discriminatory (A. 103-111).

Otter Tail's objections to wholesaling were not based on engineering or technical factors. Since it was already serving the towns at retail, it could have continued to provide the same amount of power on a wholesale basis with no more than a bookkeeping change (A. 109). In fact, Otter Tail sells or has agreed to sell power at wholesale to other electric power systems: It has agreed to sell supplemental power at wholesale to the seventeen municipal systems to which it wheels power for the Bureau of Reclamation; it sells power for resale to fellow members of its power pool; and it has agreed to sell

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[14] In Finley, Otter Tail installed a permanent area line crew; in Velva, it established a new line crew, agreed to an improved municipal service contract and subsequently installed new street lighting (A. 83-85).

emergency and backup power at wholesale to cooperatives and another municipal system (A. 108-109).

Similarly, since Otter Tail's 41.6 kv subtransmission system was already delivering power to Elbow Lake and Hankinson, the company could wheel power to meet the same retail loads without placing any additional burden on its current operations (A. 107). Moreover, Otter Tail has traditionally had excess capacity on its transmission system and currently wheels power for the Bureau of Reclamation to 17 municipal systems and ten governmental institutions (A. 105) and for various cooperatives and investor-owned utilities (A. 105-107). Otter Tail's contract with the Bureau of Reclamation conditions the company's obligation to wheel on the existence of excess capacity on its transmission lines, yet in no instance has Otter Tail been unable to wheel power for the Bureau to the Bureau's preference customers (A. 106).

Because Otter Tail's refusals to deal cut Elbow Lake off from sources of wholesale power, the town was forced to construct its own generating plant to meet its base load—a plant it would not have built had it been able to obtain power from any other source (A. 61). Even after the decision to build its own generating plant had been made, the town continued its efforts to persuade Otter Tail to sell it power at wholesale (A. 53, 59).

Both Elbow Lake and Hankinson requested the Bureau of Reclamation and various cooperatives to furnish them with wholesale power; these sources

were willing to supply the power if Otter Tail would wheel it, but Otter Tail refused (A. 55, 57-61, 64-68). Otter Tail also asserted that provisions in its contracts with the Bureau and other cooperatives prohibited the use of Otter Tail's transmission lines for the wheeling of power to towns served at retail by Otter Tail (A. 57, 60-61, 66-67, 95, 1146-1147, 1172). The restrictive provision in Otter Tail's contract with the Bureau (art. 27(c)(2), A. 1078-1079), which was inserted at Otter Tail's request, affords Otter Tail a means of preserving its existing customers (A. 127-128). There is no engineering justification for the provision and the Bureau acceded to it only because the overall contract was the most practical arrangement it could make at the time to deliver power to its preference customers (A. 128).

Elbow Lake completed its generating plant in June 1966 and began operation of its own isolated municipal power system (A. 58-59). As part of its continuing effort to obtain supplemental power from or through Otter Tail, the town applied to the Federal Power Commission under Section 202(b) of the Federal Power Act, 16 U.S.C. 824a(b), for an order compelling Otter Tail to interconnect with the town and sell it power at wholesale. Attempts by the Commission's staff to settle the case were unsuccessful (A. 59). After conducting formal proceedings, the Commission ordered Otter Tail to make a temporary interconnection between its facilities and the Elbow Lake municipal system and to provide supplementary

power at wholesale to the town.[15] After further proceedings, the Commission ordered a permanent interconnection between the two systems.[16]

Hankinson sought to compel Otter Tail to provide its proposed municipal systems with wholesale and wheeling service by filing a complaint with the North Dakota Public Service Commission, but the Commission dismissed the complaint on the ground that it lacked jurisdiction to grant the requested relief (A. 69). The town also filed a complaint with the Federal Power Commission seeking an order to compel Otter Tail to wheel (*ibid.*). While the complaint was pending, however, Hankinson gave up its struggle of nearly five years to establish its own system; its town council voted 4 to 3 to withdraw the complaint and subsequently renewed Otter Tail's franchise (A. 70).

2. *Otter Tail's use of litigation.* Municipally owned power systems are financed by the sale of electric revenue bonds. Before such bonds can be sold, however, an attorney representing the town selling the bonds must submit an opinion to the prospective buyers attesting to the viability of the municipal electric system and the marketability of the bonds. As one of the preconditions to the issuance of the

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[15] *Village of Elbow Lake* v. *Otter Tail Power Co.*, 40 F.P.C. 1262, affirmed, *Otter Tail Power Co.* v. *Federal Power Commission*, 429 F. 2d 232 (C.A. 8), certiorari denied, 401 U.S. 947.

[16] *Village of Elbow Lake* v. *Otter Tail Power Co.*, F.P.C. Opinion No. 603, September 13, 1971 (A. 187-203), petition for review pending *sub nom. Otter Tail Power Co.* v. *Federal Power Commission*, C.A. 8, No. 72-1088.

opinion, the town must certify to the attorney that there is no pending or threatened litigation which might impair the value or legality of the bonds. Thus, the pendency of such litigation has the effect of preventing the sale of revenue bonds (A. 40, 102-103). Otter Tail instituted or sponsored litigation involving four of the towns in its service area, which had the effect of halting or delaying efforts to establish municipal systems (A. 50-52, 54-56, 69-70, 72-77, 79-83).

Otter Tail first used litigation as a means of protecting its status as the monopoly retail supplier of electricity within a town in 1950. In that year, after the residents of Elbow Lake had voted to replace Otter Tail with a municipal system, Otter Tail and three local residents filed suit against the town challenging the bidding procedures for the selection of contractors to construct the new system and the legality of the proposed revenue certificates (A. 50-51). The trial court rejected each of the contentions and, on Otter Tail's appeal, the Minnesota Supreme Court unanimously affirmed,[17] but the litigation lasted more than a year (A. 51). In 1952, Elbow Lake accepted Otter Tail's offer to pay the town $14,000 for expenses incurred in its efforts to establish a municipal system at that time on condition that the town abandon those efforts, renew its franchise and sign a new street light contract (A. 52, 1154-1164).

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[17] *Otter Tail Power Co.* v. *Village of Elbow Lake*, 234 Minn. 419, 49 N.W. 2d 197.

Ten years later, the residents of Elbow Lake again voted to establish a municipal electric system (A. 53) and Otter Tail again brought suit to enjoin construction and the sale of bonds, this time challenging the legality of the plans and specifications for the proposed system, the bidding procedures and the prospectus for the sale of the bonds (A. 54). As before, the trial court rejected the contentions and its ruling was unanimously affirmed by the Minnesota Supreme Court (A. 54-56).[18] While the appeal was pending, Otter Tail offered to reimburse the town for its expenses in connection with the municipal power project, install new and improve old street lighting facilities, grant the town a favorable rate for electricity consumed by municipal pumps and withdraw from the litigation, all on condition that the town grant Otter Tail a new franchise and sign a municipal services contract. Elbow Lake rejected the offer (A. 55). Although, following its victory in court, Elbow Lake persisted and eventually established its municipal system, Otter Tail's suit delayed that establishment for two and one-half years (A. 56).

In Hankinson, Otter Tail did not initiate litigation in its own name to block the proposed municipal system, but instead supported a suit brought by local residents by meeting with the residents and absorbing their legal fees (A. 69). The complaint filed by the residents alleged that the expenditure

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[18] *Otter Tail Power Co.* v. *MacKichan*, 270 Minn. 262, 133 N.W. 2d 511.

of funds by the city council to establish a municipal system was barred by various provisions of state law (*ibid.*). This time, the lower court ruled in favor of the local residents supported by Otter Tail, but the ruling was reversed and the suit ordered dismissed by the North Dakota Supreme Court (A. 69-70).[19] Although unsuccessful, the suit delayed the town's effort to establish a municipal system by more than a year and a half (A. 70). Hankinson subsequently accepted Otter Tail's offer to pay unpaid legal fees owed by the town and all engineering costs incurred in connection with the proposed municipal system on condition that the city grant Otter Tail a ten-year franchise (*ibid.*)

After the electorate of Colman, South Dakota, had voted in favor of the establishment of a municipal electric power system, Otter Tail and a local citizen brought suit alleging (1) that the town election had been preceded by inadequate notice and was therefore invalid, (2) that the sale of revenue bonds would be illegal since there was no assurance that the municipal system could be constructed and operated within the proposed budget and since the resolution of the city council authorizing the sale of the bonds was technically deficient, and (3) that the plans and specifications for the system did not form a proper basis for competitive bidding (A. 72-73). The trial court dismissed the complaint and, on Otter Tail's appeal, the South Dakota Supreme Court affirmed

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[19] *Anderson* v. *City of Hankinson*, 157 N.W. 2d 833 (N.D.).

(A. 73-74).[20] The lawsuit delayed the establishment of a municipal system in Colman for two years (A. 74).

In addition to its suit challenging the legality of revenue bonds and competitive bidding procedures, Otter Tail drafted and persuaded Colman residents to sign an initiative petition calling for an election to repeal the resolution previously approved by the electorate authorizing the establishment of a municipal system (A. 74-75). When the town refused to schedule the election, Otter Tail paid all the legal expenses incurred in connection with a mandamus action by three residents seeking to compel the town to hold the election (A. 75). Mandamus was denied by the circuit court, the denial was affirmed by the Supreme Court of South Dakota [21] and a petition for rehearing was denied, but the proceedings further delayed for more than a year Colman's efforts to establish its own power system (A. 76-77).[22] As in Elbow Lake and Hankinson, Otter Tail offered to pay the town's expenses and make certain improvements in its service in return for a new franchise, but

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[20] *Otter Tail Power Co.* v. *City of Colman*, 121 N.W. 2d 483 (S.D.).

[21] *State ex rel. Strenge* v. *Westling*, 130 N.W. 2d 109 (S.D.).

[22] At one point Otter Tail also attempted to erect physical obstacles in the way of Colman's proposed municipal system. Shortly after the initiative petition was filed, Otter Tail, without notice, began replacing its existing poles with taller poles, which would have forced the new municipal distribution system either to build even higher poles or to place its lines underground, thereby increasing its cost of construction. After the town filed suit, Otter Tail desisted (A. 74-75).

the town rejected the offer and eventually succeeded in establishing its own system (A. 77).

Finally, Otter Tail instituted or supported similar litigation in Aurora, South Dakota, in another attempt to preserve its position. Shortly after the electorate there had endorsed a new municipal system to be financed by the sale of revenue bonds, and only three days before the deadline for the receipt of bids from prospective buyers of the bonds, Otter Tail and three local residents sued to enjoin construction and the sale of the bonds on virtually the same grounds asserted in the initial suit against the town of Colman (A. 79-80). Following the filing of the complaint, only one bid was received for the bonds and that was rejected since it was for only part of the proposed issue (A. 80). When the town board thereupon adopted a resolution authorizing the town to bid for its own bonds, Otter Tail amended its complaint to challenge this resolution as well (A. 80-81). The trial court ruled that Otter Tail had no standing to maintain the action, found that the election authorizing the municipal system and the bonds was valid, but held that the town could not purchase its own bonds (A. 81). As in Colman, Otter Tail then persuaded town residents to sign an initiative petition asking for an election to repeal the previous authorization (A. 82). When the town refused, Otter Tail encouraged and paid all legal fees in connection with the filing of a mandamus action (*ibid.*). In this case, however, the town did not defend the action, but merely held the requested special election

(*ibid.*). The referendum to repeal authorization of the municipal system was defeated by almost a 3-1 margin and Aurora eventually succeeded in establishing its own system (A. 82-83). Otter Tail's lawsuit and the initiative petition and mandamus proceeding, however, delayed establishment of the system for approximately three years (A. 83).

In summary, Otter Tail instituted or supported seven suits in four towns, of which five were carried to the highest state courts. All of the suits were unsuccessful on the merits (with the partial exception of the trial court's ruling in the Aurora suit that the town could not buy its own bonds); all of the suits resulted in substantial delays in the establishment of municipal power systems.[22]

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[22] In addition to the actual litigation it brought or supported, Otter Tail threatened to institute other litigation. In Elbow Lake, for example, after the Minnesota Supreme Court unanimously affirmed dismissal of its lawsuit, Otter Tail representatives were asked whether it would file any more suits against the village and responded that the company would use any legal means to protect its investment (A. 57). Similarly, in Aurora, nine months after the trial court had rejected Otter Tail's claims for lack of standing and had sustained the ordinance establishing the municipal electric system, the town's financial consultant advised that the threat of another lawsuit by Otter Tail, as well as other factors, was preventing the sale of the electric revenue bonds (A. 81). Otter Tail did not bring another suit of its own, but instead promoted and paid for the mandamus proceeding described above (A. 82).

II. THE PROCEEDINGS BELOW

A. The Decision of the District Court.

On July 14, 1969, the government filed a civil antitrust complaint against Otter Tail, charging it with attempting to monopolize and monopolizing the sale of electric power in or to towns in its service area, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2 (A. 10-15). In its answer, Otter Tail admitted refusing to deal (A. 21-22), either by wheeling or selling at wholesale, but denied any violation of Section 2 (A. 20-23).

The case was tried before the district court in June 1971. Many of the facts had been stipulated by the parties (A. 29). The court first issued an opinion (A. 27-46) and subsequently entered detailed findings of fact and conclusions of law (A. 47-130). In its opinion, the court noted that Otter Tail had a monopoly of the retail distribution of electricity in its service area (A. 33-34), and held that Otter Tail had sought unlawfully to preserve its monopoly position in two principal ways:

First, the court found that Otter Tail's admitted and consistent refusals to wholesale or wheel power to its municipal customers who sought to establish their own distribution systems was an unlawful attempt by Otter Tail to exclude municipal competition and to preserve its monopoly (A. 37-40). The court found that Otter Tail was aided in this effort by its "strategic dominance" (A. 36) over transmission facilities in its area, and that Otter Tail had relied on restrictive provisions in its transmission agreements

with other power suppliers in support of its refusals to wheel (A. 35). The contractual provisions, the court held, amounted to an allocation of markets (A. 42-43), and were not immunized from antitrust attack merely because the agreements were made with government instrumentalities (*ibid.*). Second, the district court found that the litigation instituted or sponsored by Otter Tail was designed to frustrate efforts to establish municipal distribution systems (A. 40-42). Litigation was found to be a particularly powerful instrument here, since its very existence frustrates the sale of revenue bonds needed to finance municipal systems (A. 40).

The district court rejected Otter Tail's claim that its conduct was justified by the need to prevent the erosion of its system. Observing that "a public utility which [like Otter Tail] operates without exclusive franchises from its customers does not have a right to be free of competition" (A. 45), the court found that Otter Tail's "pessimistic view of the matter * * * is not supported by the record," and that "it does not appear that Bureau of Reclamation power is a serious threat to the defendant nor that it will be in the foreseeable future" (A. 46). In addition, the court ruled that Otter Tail was not entitled to violate the Sherman Act in order to keep all its business for itself (*ibid.*).

B. The Judgment of the District Court.

The initial judgment enjoined Otter Tail from refusing to sell at wholesale or to wheel power to municipalities in its area; from instituting or supporting

litigation "for the purpose of delaying, preventing, or interfering with establishment of a municipal electric power system;" and from entering into agreements which bar the use of its lines for wheeling power to municipal systems or which allocate the customers to whom, or divide the territories in which, Otter Tail or any other power supplier may sell electricity (A. 131, 132). The court retained jurisdiction to construe, modify, and enforce the judgment (A. 133).

Thereafter, at Otter Tail's request (A. 135, 185), the district court amended the judgment by adding the following provision (A. 206): "The defendant shall not be compelled by the Judgment in this case to furnish wholesale electric service or wheeling service to a municipality except at rates which are compensatory and under the terms and conditions which are filed with and subject to approval by the Federal Power Commission."

The primary thrust of Otter Tail's brief in this Court is that the Federal Power Act bars the district court from granting effective relief in this antitrust case. Before the district court, however, Otter Tail initially conceded that the Federal Power Act does not foreclose the application of the antitrust laws to refusals to wholesale or wheel power.

Shortly after filing its answer and a year before trial, Otter Tail filed a motion for a continuance of the antitrust action until completion of proceedings on Elbow Lake's application to the Federal Power Commission for an order requiring Otter Tail

to interconnect with the town's municipal system. Otter Tail conceded that the district court had "independent jurisdiction of this case under the Sherman Act" and would not be bound by the decision of the Commission in the Elbow Lake proceeding (Brief in support of motion for continuance, pp. 2-4). On oral argument of the motion, Otter Tail again stated that the court would not be bound by the outcome of the interconnection proceeding before the Commission and observed that the government's case and the Elbow Lake proceedings are "based on different laws and have a different governing principle in some degree" (Tr., August 24, 1969, p. 12). The court denied the motion for a continuance (A. 2-3).

In the proceeding before the Commission, Otter Tail contended that municipalities were not among the entities which could seek compulsory interconnections under Section 202(b) of the Federal Power Act. In granting Elbow Lake a temporary interconnection pending further proceedings on the propriety of a permanent interconnection, the Commission rejected Otter Tail's argument and the court of appeals affirmed in an opinion handed down nearly a year before the trial of the antitrust case. *Village of Elbow Lake* v. *Otter Tail Power Co.*, 40 F.P.C. 1262, affirmed, *Otter Tail Power Co.* v. *Federal Power Commission*, 429 F. 2d 232 (C.A. 8), certiorari denied, 401 U.S. 947.

Following the court of appeals' affirmance of the temporary interconnection order, Otter Tail still did

not contend in this antitrust case that the district court's jurisdiction under the Sherman Act was repealed by the Federal Power Act. Instead, it argued that if the Commission ordered a permanent interconnection, then the Federal Power Act would exempt the compelling of wholesale service under the antitrust laws; it also contended that the court could not compel investor-owned utilities to wheel power (Def. Post-Tr. Br., pp. 9-12). After the Commission had ordered a permanent interconnection between Otter Tail and Elbow Lake[24] and the district court had entered findings and conclusions of law in this case, Otter Tail asserted, in its alternative motions for post-judgment relief, that the wholesaling of electric power was within the exclusive jurisdiction of the Commission, and reiterated its position on compulsory wheeling (A. 137-140). In denying Otter Tail's motions, the district court rejected these arguments without opinion (A. 205).

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[24] *Village of Elbow Lake* v. *Otter Tail Power Co.*, Op. No. 603 (A. 187-203). On February 18, 1972, Otter Tail petitioned for review of this decision. *Otter Tail Power Co.* v. *Federal Power Commission*, C.A. 8, No. 72-1088. In its brief before the court of appeals, Otter Tail does not challenge the interconnection itself, but limits its attack to the terms of interconnection imposed by the Commission's order (App. Br. p. 10, n. 13).

ARGUMENT

INTRODUCTION AND SUMMARY

This case concerns competition between proposed municipal electric systems and an investor-owned electric utility for franchises to distribute electricity at retail in certain small midwestern towns. The district court correctly held that Section 2 of the Sherman Act protects this competition and thus the right of each town to decide who shall distribute electricity at retail in its territory. Applying well-settled antitrust principles to this narrow issue, the district court properly concluded that an electric utility may neither use the leverage conferred by its lawful monopoly over the supply and transmission of electric power nor abuse its right to litigate, for the purpose of suppressing competition from a proposed municipal system seeking to replace it after its franchise has expired.

A.

The Sherman Act and other federal antitrust laws have been applied to public utilities in numerous cases, notwithstanding the proliferation of federal regulatory statutes governing such utilities. Because of the fundamental national policy embodied in the antitrust laws, this Court has held they apply to regulated industries except where Congress has expressly declared them inapplicable or where their application would irreconcilably conflict with a regulatory scheme. *United States* v. *Philadelphia National*

Bank, 374 U.S. 321, 350-351. In the absence of an express statutory exemption, the independent application of the antitrust laws to a regulated industry in a particular case turns on an analysis of the scope of the regulatory scheme and the asserted conflict between specific regulatory provisions and the antitrust remedies sought to be applied to the conduct in issue.

With respect to the electric power industry, Congress has repeatedly shown concern that competition be preserved to the extent feasible. The Public Utility Act of 1935—which included both the Public Utility Holding Company Act of 1935 and Part II of the Federal Power Act—was enacted in the light of exhaustive studies of structural and competitive conditions in the electric power industry. The Public Utility Holding Company Act specifically declares "restraint of free and independent competition" to be one of the evils afflicting relationships among public utility holding companies. 15 U.S.C. 79a(b)(2). In view of these studies and the explicit reference to competition in Title I of the Public Utility Act, it is most unlikely that Congress intended to displace the antitrust laws with a limited regulatory scheme in Title II. And there is no indication in either the language or the legislative history of the Federal Power Act that the antitrust laws were to be inapplicable to the electric power industry.

While the Federal Power Act does confer important economic regulatory functions on the Federal Power Commission, the Commission's powers are limited and

do not include the power to exempt anticompetitive conduct from the antitrust laws or to grant effective relief from such conduct. And, although the Commission must consider antitrust policies in administering the Act, such consideration does not exempt approved conduct from the operation of the antitrust laws. See *California* v. *Federal Power Commission*, 369 U.S. 482.

Since the Federal Power Act does not repeal the independent operation of the antitrust laws with respect to the electric power industry, we next consider the role of competition in the industry. The structure of the industry indicates that its most significant sector is comprised of vertically integrated, investor-owned systems which generally dominate the generation, transmission and distribution of electric power in their service areas. In addition to these dominant firms, however, are a number of small private utilities, municipal systems and cooperatives, which have little or no generation, bulk transmission or subtransmission facilities and thus depend substantially on the larger companies for wholesale power or access to wholesale power in order to serve their retail customers. These small systems—in this case, existing or proposed municipal systems—are a source of significant competition to the integrated, investor-owned utility in the retail distribution of power.

With specific reference to the present case, the right of proposed municipal systems in Otter Tail's service area to compete with Otter Tail for the

opportunity to distribute electricity at retail within the towns cannot be doubted. The retail franchises under which Otter Tail operates are non-exclusive and limited to period of 10 or 20 years; the company is thus subject to periodic competition for the right to be the lawful retail monopolist within a town. The record in this case supports the conclusion that such competition is an important safeguard affecting the quality of service and level of rates. Municipal systems also offer an important competitive yardstick by which the performance of private utilities can be measured.

That some aspects of the electric power industry are characterized by natural and lawful monopolies does not prevent the application of the Sherman Act to protect actual, potential and "yardstick" competition. For it is not the acquisition or the existence of lawful monopoly power which is under attack here; rather it is the use of monopoly power to suppress competition which constituted a violation of Section 2 of the Sherman Act.

B.

Turning to the challenged conduct in this case, we show first that Otter Tail possesses monopoly power in the relevant geographic markets—which consist of each town in which it distributes at retail and the aggregate of towns in which it competes in its service area—and also is dominant in the subtransmission of power in its area. The record firmly establishes that Otter Tail used its dominance in

transmission to suppress competition at the retail level from proposed municipal systems in the towns it served by refusing to sell at wholesale or wheel power to the proposed systems. It is well settled that refusals to deal by a monopolist for anticompetitive reasons violate Section 2 of the Sherman Act.

In addition to abusing its dominant position in transmission to preserve its monopolies, Otter Tail invoked provisions in transmission agreements it had entered into with other bulk suppliers of electricity. These provisions prevented the suppliers from using Otter Tail's transmission system to wheel power to towns then being served at retail by Otter Tail. Restrictive provisions of this type amount to naked territorial allocations designed to suppress competition and are illegal as an abuse of monopoly power; they are also illegal *per se*. See *United States* v. *Topco Associates*, 405 U.S. 596.

Finally, Otter Tail improperly used litigation to prevent or delay the establishment of municipal systems in towns in which its retail franchises had expired. The record establishes that the litigation—virtually all of which was unsuccessful—was not instigated to remedy alleged deficiencies in proposed sales of revenue bonds or in bidding procedures for construction contracts, but was instigated or supported solely to suppress competition and preserve Otter Tail's monopoly position in each town. Such litigation does not constitute legitimate political activity, as Otter Tail asserts, but is "nothing more

than an attempt to interfere directly with the business relationships of a competitor" and is thus illegal under the Sherman Act. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 144. See *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508.

Contrary to Otter Tail's contentions, its anticompetitive behavior was not justified by the nature of the electric power industry, by the fact that three towns against which it applied its unlawful tactics succeeded in establishing municipal electric power systems or by its alleged need to protect its system from erosion through the loss of retail distribution franchises.

C.

In Point III, we answer Otter Tail's contentions that Congress displaced normal antitrust remedies for refusals to sell at wholesale and refusals to wheel by, on the one hand, giving the Federal Power Commission specific authority to order interconnections and sales of electric energy under Section 202 (b) of the Federal Power Act and, on the other hand, refusing to give the Commission authority to compel wheeling.

Section 202(b) is designed to implement congressional policies favoring interconnection among electric utilities. These policies, while not inconsistent with the principles underlying the antitrust laws, have a different thrust. A utility seeking Commission-compelled interconnection under Section 202(b) need not establish that a utility's refusal to interconnect is

based on anticompetitive considerations. Conversely, Section 202(b) does not, and was not intended to, provide a substitute for judicial relief from anticompetitive refusals to agree to sell electric power at wholesale to proposed municipal systems. First, it is not clear that *proposed* systems are entitled to apply for relief under Section 202(b). Second, many small utilities or proposed utilities lack the financial resources to engage in protracted proceedings under Section 202(b); to require towns with which Otter Tail refuses to deal to resort to such proceedings would impose an undue burden on them not shared by towns with which Otter Tail has established interconnections voluntarily. In fact, most interconnections and sales of power at wholesale are effected voluntarily and the purpose of the antitrust remedies applied in this case is only to prevent Otter Tail from refusing to sell power at wholesale solely for anticompetitive reasons. Finally, Section 202(b) obviously provides no remedy against the improper use of litigation to block or delay the establishment of municipal systems.

With respect to wheeling, the fact that Congress has consistently declined to give the Commission administrative authority to compel wheeling cannot properly be construed as a partial repeal of the antitrust laws permitting utilities to use their monopoly positions to block competitors' access to wholesale power. Nor is the effect of the decision in this case to convert electric utilities into common carriers. Judicially ordered wheeling is appropriate only as a

remedy for specific anticompetitive conduct; under the antitrust laws utilities may refuse to wheel for any reason not connected with the suppression of competition.

D.

Finally, the district court's decree does not encroach upon the responsibilities of the Federal Power Commission, but expressly preserves the Commission's jurisdiction to pass on the rates and other terms and conditions of any wholesaling or wheeling arrangements entered into pursuant to the decree.

I. THE ANTITRUST LAWS ARE FULLY APPLICABLE TO THE ELECTRIC POWER INDUSTRY

A. The Antitrust Laws Apply to Regulated Industries Except Where Congress Has Expressly Declared Them Inapplicable or Where Their Application Would Irreconcilably Conflict with a Regulatory Scheme.

Antitrust principles were applied to public utilities under the common law prior to the enactment of the Sherman Act. See *Gibbs* v. *Baltimore Gas Co.*, 130 U.S. 396. These principles have continued to be applied to public utilities under the federal antitrust laws notwithstanding the proliferation of direct government regulation. In the early years of enforcement of the antitrust statutes, most of the cases involved agreements among competing railroads and consolidations of railroads.[25] But antitrust laws have

[25] *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290; *United States* v. *Joint Traffic Association*, 171 U.S.

also been held applicable to attempts by a monopoly carrier to eliminate competition by refusing to deal with other companies;[26] to acquisitions in the regulated bank,[27] broadcast,[28] and natural gas industries;[29] and to collective refusals to deal by a regulated stock exchange.[30]

The repeated application of the federal antitrust laws to regulated industries stems from the fact that the antitrust laws and the policies underlying them represent fundamental national policy (see *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4), and their repeal by implication is strongly disfavored. *United States* v. *Philadelphia National Bank*, *supra*,

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505; *Northern Securities Co.* v. *United States*, 193 U.S. 197; *United States* v. *Terminal Railroad Association*, 224 U.S. 383; *United States* v. *Union Pacific R. Co.*, 226 U.S. 61; *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439. Railroad consolidations and collective agreements related to ratemaking were ultimately subjected to the exclusive regulatory jurisdiction of the Interstate Commerce Commission under legislation which specifically provided that actions approved by the Commission would be exempt from the antitrust laws. See 49 U.S.C. 5(2), 5b(2).

[26] *United States* v. *Pacific & Arctic Railway & Navigation Co.*, 228 U.S. 87.

[27] See, *e.g.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321; *United States* v. *First National Bank & Trust Co. of Lexington*, 376 U.S. 665.

[28] *United States* v. *Radio Corporation of America*, 358 U.S. 334.

[29] *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651; *California* v. *Federal Power Commission*, 369 U.S. 482.

[30] *Silver* v. *New York Stock Exchange*, 373 U.S. 341.

374 U.S. at 350. Regulated industries are thus exempt from the antitrust laws only where Congress has expressly so declared,[21] or where independent application of the antitrust laws would irreconcilably conflict with a comprehensive federal regulatory scheme. *United States* v. *Philadelphia National Bank*, *supra*, 374 U.S. at 350-355; *Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 357-361. This principle is based upon realistic recognition of the strengths and limitations of the regulatory process and of the wide variations in the powers and responsibilities of the many regulatory agencies. In the absence of a statutory exemption, the test for whether an irreconciliable conflict is present depends upon how the particular regulatory statute invoked, and the antitrust remedies asserted, apply to the specific conduct in issue. Compare *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, with *United States* v. *Pacific & Arctic Railway & Navigation Co.*, *supra*; *Keogh* v. *Chicago & Northwestern Ry. Co.*, 260 U.S. 156, with *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439; *Far East Conference* v. *United States*, 342 U.S.

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[21] Conduct expressly declared to be exempted from the antitrust laws is usually subject to regulatory scrutiny and approval before the exemption becomes effective. See, *e.g.*, 49 U.S.C. 5(11) (ICC approved rail mergers); 46 U.S.C. 814 (collective agreements among ocean carriers); 49 U.S.C. 1384 (mergers and agreements among air carriers). The procedures for and conditions of exemption must be strictly adhered to. See, *e.g.*, *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217; *United States* v. *Borden Co.*, 308 U.S. 188, 201.

570, with *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213.[22]

The fact that Congress has granted an agency the power to authorize conduct subsequently challenged in antitrust proceedings does not operate to repeal the independent operation of the antitrust laws by implication where the agency has no statutory power to grant an exemption and is not authorized to remedy antitrust violations arising out of the con-

[22] In *Abilene Cotton*, the Court held that a shipper could not sue in a state court for damages arising out of unreasonable and discriminatory retail freight rates, since the ICC had the exclusive authority to determine the reasonableness of rates and judicial interference would destroy the uniformity in rates envisioned by Congress. But in *Pacific & Arctic Railway & Navigation Co.*, this Court sustained antitrust counts in an indictment alleging that a monopoly railroad participating in through routes under agreements with certain steamship companies violated Section 2 of the Sherman Act by refusing to interchange traffic with competing steamship companies and by charging higher rates for traffic carried by such companies. In *Keogh*, an antitrust suit for damages arising from ICC-approved rates allegedly resulting from a ratemaking conspiracy among railroads was dismissed on the ground that award of antitrust damages would constitute a preferential rebate inconsistent with the regulatory scheme of the Interstate Commerce Act. But in *Georgia* v. *Pennsylvania R. Co.*, an antitrust injunction suit by a State against railroads for a similar ratemaking conspiracy was permitted, since an injunction would confer no preferential benefit, no relief was sought against any tariff, and the rate fixing combination itself was not subject to ICC jurisdiction. Finally, in *Far East Conference*, a government antitrust suit seeking to enjoin a shipping conference's dual rate system was dismissed on the ground that the subject matter was within the primary jurisdiction of the Federal Maritime Commission, while *Carnation Co.* allowed a private antitrust suit for damages arising from past conference practices which had never been submitted to the Commission for approval.

duct in issue, and where the regulatory scheme is not intended to be a full substitute for competition.[33] Compare *California* v. *Federal Power Commission*, *supra*, and *United States* v. *Philadelphia National Bank*, *supra*, with *Pan American World Airways* v. *United States*, 371 U.S. 296, 305. In *California* and *Philadelphia National Bank*, the Federal Power Commission and the Comptroller of the Currency had specifically approved acquisitions under their respective regulatory statutes. In both cases, however, the Court held that the government could subsequently challenge the acquisitions in antitrust suits, since the statutes did not subject the natural gas or banking industries to pervasive regulation and did not empower the agencies to adjudicate antitrust issues. In the *Pan American* case, on the other hand, an antitrust suit challenging an alleged conspiracy to divide foreign air routes was ordered dismissed; the Court ruled that Congress had enacted a basic and comprehensive regulatory scheme, had substituted agency control of routes for free competition to develop them, and had given the agency specific powers to issue remedial orders with respect to unfair competition in air transportation.[34]

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[33] For a fuller discussion of our views on the relationship between the doctrine of primary jurisdiction and the antitrust laws, see our brief as *amicus curiae* in *Ricci* v. *Chicago Mercantile Exchange*, No. 71-858, certiorari granted, 405 U.S. 953. We are providing appellant's counsel with a copy of this brief.

[34] See also *Keogh* v. *Chicago & Northwestern Ry. Co.*, *supra*, which held that while a private antitrust suit for damages

It is in the light of these general principles that we now turn to an analysis of regulation in the electric power industry.

B. In Enacting the Federal Power Act, Congress Did Not Repeal By Implication the Application of the Antitrust Laws to the Electric Power Industry.

In its early stages, the electric power industry consisted primarily of local, independent monoplies with very little interstate transmission of electric energy; then prevailing concepts of interstate commerce lessened the impact of the federal antitrust laws. With improvements in the technology of generation and transmission, a wholesale market developed, interstate transmissions became common and operating companies were rapidly grouped into large, interstate holding companies. See Federal Trade Commission Report to the Senate—*Utility Corporations*, S. Doc. No. 92, 70th Cong., 1st Sess., Part 72A, pp. 8-9, 38-42 (hereinafter "*Utility Corporations*"). Application of the antitrust laws to the industry still lagged, however, apparently due in part to the erroneous assumption that the inherent absence of competition at the local retail level extended to regional operations as well. See *Utility Corporations*, Part 73A, pp. 47, 50-51. Moreover, not until this Court's decision in 1927 in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 86, was it clear that the

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arising from ICC-approved rail rates would not lie, a rate-fixing combination among the carriers could be redressed in antitrust proceedings by the United States notwithstanding Commission approval. 260 U.S. at 162, 163.

transmission of electricity from one State to another constituted interstate commerce and thus provided a basis for applying the federal antitrust laws.

The absence of specific applications of the antitrust laws, however, stands in contrast to repeated expressions of concern by Congress from 1914 to 1970 that there should be no more monopoly or restraint of trade in the electric power industry than is absolutely necessary. In 1914, for example, when Congress was considering the legislation which became the Clayton Act, representatives of the major public utility holding companies, including electric utilities, urged that their companies be exempted from the new law. See Hearings on Trust Legislation before the House Committee on the Judiciary, 63d Cong., 2d Sess., p. 1825. No such exemption was adopted. Six years later, Congress provided in Section 10(h) of the Water Power Act of 1920, 41 Stat. 1068 (now Section 10(h) of the Federal Power Act, 16 U.S.C. 803(h)), that all federal licenses of hydroelectric plants must contain a condition prohibiting agreements and combinations to restrain trade. Under Section 10(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79j(b)(1), the Securities and Exchange Commission is required, in determining whether to approve an acquisition by a public utility, to consider whether the acquisition will tend to create interlocking relations or the concentration of control of public utility companies, detrimental to the public interest.[35] More recently, in

[35] This provision requires the SEC to consider claims of competitive injury to municipal power systems arising out of

Section 105 of the Atomic Energy Act of 1954, 42 U.S.C. 2135, Congress expressly declared that nothing in the Act would relieve any person from the operation of the antitrust laws, and in the 1970 amendments to this Section required the Atomic Energy Commission to consider antitrust questions prior to the granting of licenses for nuclear power plants. 84 Stat. 1473. See H. Rep. No. 91-1470, 91st Cong., 2d Sess., p. 13.[86]

Congress' repeated concern for the preservation of competition in the electric power industry to the extent feasible is also manifested in the legislative history of the Public Utility Act of 1935, 49 Stat. 803. In adopting the Act, which includes both the Public Utility Holding Company Act of 1935 as Title I, and

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holding company acquisitions of the stock of electric generating companies. *Municipal Electric Association* v. *Securities & Exchange Commission*, 413 F. 2d 1052 (C.A.D.C.); see also *Municipal Electric Association* v. *Securities & Exchange Commission*, 419 F. 2d 757 (C.A.D.C.).

[86] During the hearings on these amendments, spokesmen for the Edison Electric Institute and other utility interests contended that consideration of antitrust factors in connection with licensing procedings before the AEC is unnecessary because the antitrust laws apply in any event to the power industry. See, *e.g.*, Hearings on Prelicensing Antitrust Review of Nuclear Power Plants before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess., pp. 322, 443. See also 116 Cong. Rec. 34309 (remarks of Mr. Holifield); S. Rep. No. 91-1247, 91st Cong., 2d Sess. at pp. 11-12, 13-15, summarizing and explaining Congress' deep conviction that antitrust principles should be applied to the licensing of electric generating facilities powered by nuclear reactors.

part II of the Federal Power Act as Title II,[37] Congress had the benefit of exhaustive studies of structural and competitive conditions in the electric power industry. Shortly after this Court held in *Public Utilities Commission* v. *Attleboro Steam & Electric Co., supra*, that interstate sales of electric energy at wholesale were beyond the reach of state regulatory authorities, the Senate directed the Federal Trade Commission to undertake a comprehensive examination of utility corporations and holding companies, and "to report particularly whether any of the practices * * * [to be investigated] tend to create a monopoly or constitute violation of the federal antitrust laws." *Utility Corporations*, Part 72A, p. 6. In 1935 the Federal Trade Commission delivered its landmark study. *Utility Corporations*, Part 73A. Responding particularly to the Senate's request for comment on the applicability of the antitrust laws, the report noted (Utility Corporations, Part 73A, p. 52):

> While ordinarily there is not actual competition between operating units under diverse ownership, there is frequently potential competition in that a given operating system may readily extend its lines and service to municipalities and sections which are on the edges of the territory occupied and served by a rival system. * * *

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[37] Titles I and II of the Act were drafted separately but were consolidated into one bill shortly before being introduced in Congress. DeVane, *Highlights of the Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30, 37-38 (1945).

> Moreover, there are hundreds of cases where municipalities own and operate their distribution lines and purchase at wholesale from private generating plants. Frequently there is no physical or engineering obstacle, but only one of policy to their making these purchases from more than one operating system. * * * Decisions of the Supreme Court recognize the protection of potential competition as coming within the proper regulation of interstate commerce.

At the same time, Congress also had before it the report of the President's National Power Policy Committee, which emphasized that monopoly should not be tolerated in the utility industry to any greater extent than is absolutely necessary. H. Doc. 137, 74th Cong., 1st Sess., p. 4. Reflecting the conclusions of these reports, Congress declared in the Public Utility Holding Company Act that "restraint of free and independent competition" was one of the evils afflicting relationships among public utility companies, 15 U.S.C. 79a(b)(2). Indeed, this Court has observed that "the theme of elimination of 'restraint of free and independent competition'" runs throughout that Act. *Securities and Exchange Commission* v. *New England Electric System*, 384 U.S. 176, 183.

In light of the reports and Congress' obvious sensitivity to the need for competition among utilities in Title I of the Public Utility Act, it would require very specific statutory language or legislative history to lead to the conclusion that in enacting the Federal Power Act or Title II of the Public Utility Act Con-

gress intended to displace the antitrust laws. In fact, there is a total absence of such language or history.

As originally proposed, Title II would have established a quite broad system of regulation, converting electric utilities into common carriers and empowering the Federal Power Commission to regulate entry into the industry, control the construction, extension or abandonment of facilities, and compel interconnections, wheeling, expansions of facilities and sales of energy.[38] As enacted, however, Title II was far more modest. 49 Stat. 847. The Commission was given jurisdiction over interstate sales of electricity at wholesale (16 U.S.C. 824(b), 824d(a)) and over mergers, acquisitions and the issuance of securities by electric utilities engaged in transmitting energy in interstate commerce (16 U.S.C. 824b-824c). And in Section 202(a) of the Federal Power Act, 16 U.S.C. 824a(a), the Commission was directed to encourage the voluntary interconnection and coordination of electric facilities, while Section 202(b) authorized the Commission, under certain limited circumstances, to order interconnections and sales or exchanges of electric energy.

Nowhere in the statute or in the legislative history is there any indication of an intent by Congress that

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[38] The text of the original proposal is set forth in Hearings on H.R. 5423 before the House Committee on Interstate Commerce, 74th Cong., 1st Sess., pp. 31-37, and Hearings on S. 1725 before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., pp. 39-44.

this limited scheme[39] should in any way displace the independent operation of the antitrust laws. The Federal Power Commission has been given no authority to exempt from the antitrust laws conduct otherwise in restraint of trade and is not empowered to grant effective relief from antitrust violations.[40] While the Commission must consider antitrust consequences in authorizing particular conduct under the public interest standard contained in various provisions of the Federal Power Act,[41] there is nothing to indicate that either such consideration, or express approval of the conduct involved, exempts firms subject to its jurisdiction from the operation of the antitrust laws.

That the antitrust laws remain fully applicable to the electric power industry is strongly supported by this Court's decision in *California* v. *Federal Power Commission*, *supra*, holding that Commission approval of a merger under Section 7 of the Natural

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[39] One commentator has characterized the Commission's compulsory jurisdiction over the interstate electric power industry as "rather slight." Miller, *A Needed Reform of the Organization and Regulation of the Interstate Electric Power Industry*, 38 Fordham L. Rev. 635, 639 (1970).

[40] In Point III, *infra*, we show that the Commission's limited authority to compel interconnections and sales of energy under Section 202(b) does not provide an effective remedy for refusals to deal and other anticompetitive conduct and thus does not bar judicially ordered relief in antitrust cases.

[41] See, *e.g.*, *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F. 2d 953 (C.A.D.C.); *City of Lafayette, Louisiana* v. *Federal Power Commission*, 454 F. 2d 941 (C.A.D.C.), certiorari granted *sub nom. Gulf States Utilities Co.* v. *Federal Power Commission*, 406 U.S. 956.

Gas Act, 15 U.S.C. 717f, does not bar a subsequent government antitrust suit challenging the merger. The Court concluded that the Natural Gas Act does not embody a "pervasive regulatory scheme" and thus does not serve to repeal the antitrust laws with respect to the natural gas industry. 369 U.S. at 485. The Natural Gas Act, 15 U.S.C. 717, *et seq.*, which "grew out of the same judicial history as did" part II of the Federal Power Act (*Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 211), gives the Commission very nearly the same powers with respect to the natural gas industry that were proposed to be granted the Commission with respect to the electric power industry in the original version of Title II.[48] In view of the far more limited regulatory scheme in the Federal Power Act as it was enacted, the *California* holding against an implied repeal of the antitrust laws applies *a fortiori* to the Federal Power Act.

In arguing that the antitrust laws are inapplicable to its anticompetitive conduct, Otter Tail asserts that the legislative history of the Federal Power Act shows that the regulatory scheme was intended

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[48] Under the Natural Gas Act, the Commission is given authority over wholesale rates (15 U.S.C. 717(b), 717c) and the construction, extension or abandonment of facilities (15 U.S.C. 717f). Under 15 U.S.C. 717f(a), the Commission may on its own motion order a natural gas company subject to its jurisdiction to interconnect with and sell natural gas to municipal or other natural gas systems, provided that the interconnection and sale would not place an undue burden on the company and would not impair its ability to serve its customers.

as a substitute for competition (Br. 40, 44). Reference is made to the testimony of one of the principal government spokesmen for the legislation, Solicitor DeVane of the Federal Power Commission. At the hearings on the original version of Title II, Mr. DeVane stated (Hearings on H.R. 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., p. 554):

> * * * There is nothing in this bill * * * that provides for competition. It is entirely silent in that respect and differs from the language of the Interstate Commerce Commission [sic] * * *.
>
> There, as you recall, Congress provided that competition should be preserved and if Congress should desire to establish competition in this industry it should be written into any legislation adopted by Congress. * * *

The above remarks would, at most, support the conclusion that the original version of part II of the Federal Power Act—which, as we have noted, would have conferred far broader powers on the Federal Power Commission than were conferred by the law as enacted—did not affirmatively establish competition in the electric power industry; Mr. DeVane was not discussing the effect of the proposed legislation on the independent applicability of the antitrust or other laws to the industry. Members of Congress debating the bill, however, expressed awareness of that applicability. One Congressman compared restraints of trade in the sale and transmission of electricity to antitrust violations in the railroad acquisition set aside in *Northern Securities Co.* v. *United States*, 193

U.S. 197. 79 Cong. Rec. 10361. And a leading opponent of Title I argued in the Senate that (79 Cong. Rec. 8929):

> * * * we need not a line of legislation, therefore, to show that the antitrust laws will apply to public-utility companies as well as to other companies; and under the procedure in many cases such illegal organizations might be dealt with in a satisfactory manner under the processes of the courts. * * *

Exactly this same point had been made in the report of the Federal Trade Commission. *Utility Corporations*, Part 73A, pp. 51-52.

In summary, while there have been few antitrust cases involving the electric power industry,[43] Congress has expressed repeated concern that competition be preserved in the industry to the extent feasible. In enacting part II of the Federal Power Act, Congress neither expressly nor impliedly displaced the independent operation of the antitrust laws with respect to the industry.[44]

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[43] For two antitrust cases which do involve the industry, see *Montana-Dakota Utilities Co.* v. *Williams Electric Cooperative*, 263 F. 2d 431 (C.A. 8), and *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. 2d 552 (C.A. 4), certiorari denied, 340 U.S. 906.

[44] The fact that various aspects of the electric power industry are subject to other federal regulatory statutes does not affect the applicability of the antitrust laws, since federal regulation is fragmented and incomplete. Thus, the Federal Power Commission, in addition to its authority under part II of the Federal Power Act, regulates the construction of hydroelectric facilities under part I of the Act, 16 U.S.C. 791a, *et*

C. Competition Plays an Important Role in the Electric Power Industry.

In the preceding pages, we have shown that nothing in the Federal Power Act bars the present government antitrust suit against Otter Tail. Before turning to the district court's specific findings of anticompetitive practices, we shall first consider the structure of the electric power industry and the role of competition within that structure relevant to the facts of this case.

1. For historical, legal, technological and economic reasons, vertically integrated, investor-owned electric utilities generally dominate the generation, transmission and distribution of electric energy throughout the United States.[45] In 1968, there were 405 investor-

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seq.; the Department of the Interior exercises direct control over the sale of wholesale power generated at government hydroelectric facilities, except TVA, 16 U.S.C. 825s; the Atomic Energy Commission controls the licenses of nuclear generating plants, and may condition its licenses to remedy anticompetitive situations in the sale of the power, 42 U.S.C. 2131-2140; the Rural Electrification Administration exercises close suprevisory power on the basis of loans it makes to rural electrification cooperatives, 7 U.S.C. 903; the Securities and Exchange Commission regulates holding company relationships, 15 U.S.C. 79, *et seq.*; and the Environmental Protection Agency administers certain environmental laws affecting the industry (see Reorganization Plan No. 3 of 1970, 84 Stat. 2086, set forth following 42 U.S.C. 4321). But there is no federal regulation over retail sales of electric energy, the construction of fossil fueled generating plants or transmission lines or wheeling (except to the extent that that conditions may be imposed to the granting of hydroelectric or nuclear licenses).

[45] One writer has suggested that the business practices which led to the enactment of the Public Utility Holding Company

owned electric utility systems of which 251 were engaged in generation and transmission as well as distribution. Federal Power Commission, *1970 National Power Survey*, Part I, p. I-2-3 (hereinafter "*Survey*"). The 200 largest of these systems owned and operated more than 75 percent of the generating capacity and serve about 80 percent of the retail customers of the total electric power industry. *Survey*, p. I-2-4. In addition to the investor-owned systems there were some 2,075 public, but non-federal systems —mostly municipal systems—of which only 706 owned generating capacity, accounting for 9 percent of the nation's total; public, non-federal systems sold about 13 percent of the total amount of energy sold in 1968. *Survey*, pp. I-2-3, I-2-5. There were 960 rural electric cooperatives in 1968, all but 67 of which were engaged solely in distribution, with sales of energy aggregating about 4.5 percent of the nation's total. *Survey*, p. I-2-3, I-2-6. Finally, some 5 major federal systems possessed about 12 percent of the country's generating capacity; except for some industrial sales by the Tennessee Valley Authority, almost all federal power is sold at wholesale to other electric systems. *Survey*, pp. I-2-3, to I-2-5.[46]

Act of 1935 probably contributed to a greater integration than would have resulted from technology or economics alone. See Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 Colum. L. Rev. 64, 67 and n. 11 (1972) (hereinafter "Meeks").

[46] While TVA operates both hydroelectric and fossil fueled generating plants, all other federal plants are hydroelectric. The federal share of the country's generating capacity is

In addition to being characterized by a variety of classes of ownership, the electric power industry operates under the impact of a rapidly evolving technology and an ever-expanding demand for electric energy. See, generally, *Survey*, pp. I-1-10 to I-1-36. Technological developments have resulted in the planning and construction of extremely large nuclear and fossil fueled generating plants and bulk transmission lines capable of economically transporting the energy output of such plants over great distances. Since the cost of such facilities often exceeds the financial resources of single firms, many are being constructed as the joint ventures of two or more investor-owned utilities, and upon completion will serve multistate areas. See generally Netschert, Gerber and Stelzer, *Competition in the Energy Market*, in Hearings on Competitive Aspects of the Energy Industry on S. Res. 334 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., pp. 194-231.[47]

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expected to decline in the future as the role of hydroelectric power declines and as investor-owned utilities continue to build large nuclear and fossil fueled plants. See *Survey*, pp. I-1-15, I-1-18, I-7-1.

[47] The combination of burgeoning demand, need for wider system reliability, environmental needs and the new movement toward large, jointly-owned facilities has produced a wide range of proposals to achieve comprehensive planning for electric reliability. See, *e.g.*, Miller, *A Needed Reform of the Organization and Regulation of the Interstate Electric Power Industry*, 38 Fordham L. Rev. 635 (1970); Hearings on Power Plant Siting and Environmental Protection before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 92d Cong., 1st Sess., parts 1-3.

In short, a relatively small number of investor-owned utility systems generate most of the electric energy consumed in this country; the smaller private utilities, the municipal systems and the cooperatives, most of which are engaged primarily in distribution,[48] are thus substantially dependent upon the large firms for access to wholesale power in order to serve their retail customers.

2. There are a variety of roles for competition to play in this structurally and technologically complex industry.[49] Our concern in this case, however, is with the role of competition in the retail market within small towns. Unlike the situation with respect to generation and transmission facilities, there are no significant economic disadvantages to small retail distribution systems. Consequently, a distribution system limited to a single community can be viable, provided that the community has access to an economic and reliable bulk power supply. Federal Power Commission, *1964 National Power Survey*,

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[48] The proportion of electric utility systems engaged solely in distribution is increasing. In 1962, 2315 out of 3578, or 64 percent of the systems in the country were engaged in distribution only; in 1968, 2416 out of 3445, or 70 percent, of the systems were so limited. *Survey*, p. I-2-8.

[49] Among the forms of possible competition in the industry are: competition for industrial loads on the fringes of utility service areas; competition to induce industrial customers to locate within a service area; wholesale competition among bulk suppliers to serve retail distributors; direct competition among integrated utilities for municipal franchises; and intermodal competition between gas and electricity for industrial and domestic uses. See *Meeks*, *supra*, pp. 81-100.

Part I, pp. 28-29. While municipal systems account for only a small percentage of total retail sales of electric energy, they provide an important alternative to retail distribution by investor-owned utilities. In order to be established or to survive, however, the proposed or existing municipal systems must have access to wholesale power. If by its control of transmission, a utility could legally cut off potential competitors from power supplies needed to compete for retail markets, the survival of these competing small systems, or the possibility of potential competition from them, would depend upon the sufferance of the dominant firm. Competition for municipal franchises in the present case, however, is both guaranteed by state law and protected by the Sherman Act, and traditional antitrust principles bar refusals to deal which would isolate a proposed or existing municipal system.

The right of a proposed municipal system to compete with Otter Tail for the opportunity to distribute electricity at retail within a town cannot be doubted. State law guarantees this right by providing that retail franchises shall be non-exclusive and shall be granted only for limited periods of 10 to 20 years. Thus periodic competition for municipal franchises in communities in Otter Tail's service area is an established condition of the electric utility business. Otter Tail has no claim to immunity from it. As this Court stated in *Alabama Power Company* v. *Ickes*, 302 U.S. 464, 479-480:

> * * * The claim that petitioner [an investor-owned utility] will be injured, perhaps ruined, by the competition of the municipalities * * * presents a clear case of *damnum absque injuria*. Stated in other words, these municipalities have the right under state law to engage in the [distribution of electric energy] business in competition with petitioner, since it has been given no exclusive franchise.

See also *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 139; *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859, 864-865 (C.A. 5), certiorari denied, 385 U.S. 815. Indeed, Otter Tail apparently conceded at the outset of this suit that municipalities could legitimately compete with it; in its Answer, the company asserted that it was "subject to competition at all levels of its operations, and particularly in the area of retail distribution" (A. 21).

Thus, although Otter Tail is subject to various degrees of federal, state and local regulation, that regulation does not displace competition as a fundamental factor in the conduct of its retail business. No federal or state agency has conferred exclusive rights upon it to distribute at retail, sell at wholesale or transmit power to communities in the three-state service area in which it operates. Otter Tail's system has grown largely by the taking over of municipal systems in its area by the competitively legitimate means of offering better service. Once having done so, however, it, in turn, is subject to the same kind of competition from proposed municipal systems.

Competition for municipal franchises is protected by the antitrust laws, even though that competition occurs only periodically when franchises expire and is for the right to operate as a lawful monopolist within town limits. See *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651. In *El Paso*, the Court struck down the merger of two natural gas companies engaged in supplying natural gas at wholesale to distributors. In the natural gas industry, wholesale contracts with distributors are for long terms and for delivery require the construction of pipelines certificated by the Federal Power Commission. Once a contract is made, therefore, the particular market supplied is withdrawn from competition. Active periodic competition does exist, however, for the initial contract and it was this competition—which, as in the instant case, was essentially for the right to be franchised as a lawful monopoly—[50] that this Court held to be protected by the antitrust laws. 376 U.S. at 660. See also *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, *supra*, 184 F. 2d at 559-560. Indeed, even where the competition is conducted exclusively before a regulatory agency—for example, in a contest between two motor carriers for the right to operate on a route which can only support one—an independent suit

[50] The role of the Sherman Act in protecting competition for the right to be a lawful monopolist has also been recognized in the unregulated sector of the economy. See *Union Leader Corp.* v. *Newspapers of New England*, 284 F. 2d 582 (C.A. 1), certiorari denied, 365 U.S. 833 (competition between two newspapers for a market which could support only one).

under the antitrust laws to protect that competition is appropriate in certain circumstances. See *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508.

In its brief (pp. 69-74), Otter Tail erroneously contends that it is being punished for possessing monopolies within the towns it serves and prohibited from taking any steps to preserve its monopoly positions. In fact, however, it is not the mere possession or acquisition of a monopoly position, but the anticompetitive act of monopolization that is prohibited by Section 2 of the Sherman Act. See *Standard Oil Co.* v. *United States*, 221 U.S. 1, 60-62; see also *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429-430 (C.A. 2); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 341-342 (D. Mass.), affirmed *per curiam*, 347 U.S. 521. Fair competition for a franchised monopoly or for a natural unregulated monopoly is not in itself unlawful. There is thus no challenge in this case to Otter Tail's monopoly positions as such, or to legitimate efforts—through offerings of better service or lower rates—to preserve these positions; it is only the company's efforts to preserve its monopoly position by suppressing competition which were challenged and held unlawful.

The ability of local retail markets periodically to require competition for retail distribution franchises is an important safeguard affecting the quality of service and the level of rates[51] in the electric power

[51] In Minnesota and South Dakota retail rates are not regulated by the States, and there is no effective municipal regu-

industry. In the present case, for example, when threatened with the loss of its franchises in particular communities, Otter Tail made such offers as improved street lighting (A. 55, 85), a more favorable municipality pumping rate (A. 55, 85), improved local maintenance services (A. 77, 84, 85), and a modernized power distribution system (A. 77). In Finley and Velva, this competitive response contributed to the renewal of its franchises (A. 84, 85); in other towns, it was not enough. Thus, the record here firmly establishes that the spur of periodic competition for the retail distribution franchise of electric power, like periodic competition for new increments of demand in the natural gas industry, serves to stimulate better service at lower cost. See *United States* v. *El Paso Natural Gas Co., supra.*

In addition to competition for municipal franchises, there are two other forms of competition in the electric power industry which have particular relevance to this case. First, even where direct competition is not evident, municipal systems can offer an important competitive yardstick by which the perform-

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lation except through the franchising process. The fact that in North Dakota utilities must file their rates with the State Public Service Commission does not diminish the importance of competition for the municipal franchises in that State. The power to establish rates and conditions of service rests with the utility, subject only to a requirement that they be within a "zone of reasonableness." See *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 506. Within this zone, there is ample room for application of the antitrust laws to preserve competition. *Georgia* v. *Pennsylvania R. Co., supra*, 324 U.S. at 460-461.

ance of private utilities can be both comparatively measured and stimulated. Regulatory agencies thus have a useful tool—in addition to their normal, but obviously less than perfect, regulatory procedures—for determining whether a private utility is effectively serving the public interest. See *Meeks*, *supra*, pp. 77-79; Hanft, *Control of Public Utilities in Minnesota*, 16 Minn. L. Rev. 457, 505 (1932). Finally, with the construction of new generating capacity and the expansion of bulk power transmission facilities, there is greater opportunity for competition at the wholesale level in the power industry, with its concomitant benefits to consumers. Both yardstick and wholesale competition could be completely forestalled if firms controlling access to retail markets could use their monopoly position to deny those markets alternative sources of power. The Sherman Act was adopted to prohibit such conduct. Compare *Northern Securities Co.* v. *United States*, 193 U.S. 197, with *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1.[53]

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[53] A further effect of such conduct is to frustrate state policies of limiting franchises to terms of 10 to 20 years, and to defeat the right of municipalities to enjoy their statutory preference in the allocation of power generated at Bureau of Reclamation hydroelectric facilities (58 Stat. 890, 16 U.S.C. 825s).

II. OTTER TAIL UNLAWFULLY SUPPRESSED COMPETITION IN ORDER TO PRESERVE ITS MONOPOLIES

A. Otter Tail Occupies Monopoly Positions in the Relevant Markets.

1. *The district court correctly found that the relevant geographic markets in this case are (1) each town individually in Otter Tail's service area and (2) the aggregate of such towns with certain exceptions.* The retail distribution of electricity in a small community is a natural monopoly; it is both environmentally undesirable and economically wasteful to establish competing retail distribution systems. Since individual customers in a town must therefore purchase their electric energy from the one local distributor, competition for municipal franchises is for the right to serve a community's entire retail load.[53] It follows that each town in Otter Tail's service area is itself a separate geographic market, which, as a unit, is periodically the subject of competition.

In addition to being an independent geographic market, each town, as a block of retail customers, is a unit in the broader geographic market encompassing Federal Power Commission Supply Area No. 26

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[53] In apparent recognition of these factors, Otter Tail agreed below that each municipality in its area constituted a "natural monopoly market for which there is potential competition between electric suppliers." Post Trial Findings of Fact and Conclusions of Law Submitted by Defendant, Finding IV (filed July 16, 1971, prior to the district court's decision). Otter Tail's present contention (Br. 72) that each town is not a separate market is in direct conflict with its position in the district court.

—a zone roughly the size of New York State which corresponds very nearly to Otter Tail's service area.[54] This area constitutes a distinct geographic market within which actual and potential utility systems periodically compete for the right to distribute electricity at retail within towns. It is thus a relevant geographic market for determining whether Otter Tail possesses monopoly power in this Sherman Act case.[55] The district court so found (A. 33)

Within this larger geographic area, the appropriate units for determining market shares are the towns rather than, as Otter Tail suggests (Br. 74), kilowatt-hours of energy sold. Since the only effective competition is for the right to distribute electricity at retail to the block of customers within each town, the size of individual retail loads is not competitively significant. The latter shows only the quantities of electricity purchased from a supplier for which the customer has no alternative. By contrast, a utility's share of the total number of towns or blocks of customers accurately reflects its market position in terms of the units for which there is effective competition. Cf. *United States* v. *Philadelphia National*

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[54] Otter Tail conceded below that "the geographic limits of the geographic relevant product market are represented by Federal Supply Area No. 26." Defendant's Post Trial Findings, etc., *supra*, Finding V.

[55] Cf. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 575-576, a monopolization case in which the geographic market for central station alarm service was held to be the national market made up of the local areas which had central station alarm service.

Bank, supra, 374 U.S. at 357; *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327.

2. *Otter Tail does not in fact face significant direct competition for retail service to municipalities from other producers of bulk power; its real competition is from proposed municipal systems.* In Federal Power Commission Supply Area No. 26, bulk power is sold by Otter Tail, the Bureau of Reclamation, generation and transmission cooperatives and the Northern States Power Company (A. 86-91). Yet, none of these entities competes with Otter Tail to provide retail service to towns in Otter Tail's service area. The Bureau does not compete for retail markets; except for minor retail sales to government institutions, it sells only at wholesale to other systems (A. 113). As we have noted (pp. 10-11, *supra*), the rural electric cooperatives cannot borrow funds from the Rural Electrification Administration to serve a community already receiving central station service; the 465 towns served by Otter Tail and the 45 towns with municipal distribution systems all currently receive central station service (A. 88-89). Finally, the Northern States Power Company does not compete to provide retail service in communities where it does not already have distribution facilities (A. 90).

Thus, competition for the retail market occurs only when Otter Tail seeks to acquire the franchise to retail electricity in a town already served by a municipal distribution system—an established corporate policy Otter Tail continues to pursue (A. 123)—or when Otter Tail's own municipal franchise expires

and the town proposes to establish its own distribution utility (A. 89).

3. *Otter Tail had a monopoly position in its area.* Viewing the record in the light of the only effective competition, the district court correctly found that Otter Tail had a monopoly position in its operating area. Since, as previously noted, Northern States and Otter Tail do not compete for retail markets,[66] the towns served by Northern States were properly excluded from the relevant geographic market. Of the remaining 615 towns, Otter Tail served 465, or 75.6 percent; 45 were served by municipal systems and 105 by REA distribution cooperatives (A. 87-88). Since the record does not show that Otter Tail attempted to compete for retail franchises in any of the 105 communities served by REA distribution cooperatives, those towns, as the district court suggested, should also be excluded from the relevant market, leaving Otter Tail with an effective share of 91 percent (A. 33-34).[67] By any measure, Otter

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[66] For example, Northern States refused to sell power at wholesale to Colman because Otter Tail was serving the town at retail and because the town was in the Otter Tail area (A. 71, 72). And neither firm seeks to serve towns that are served by the other (A. 90).

[67] The use of market shares to determine the relative competitive position of a firm in its market is well established. Cases in which this technique has been applied to violations of Section 2 of the Sherman Act include *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 424 (C.A. 2) (90%); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (68-80%); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass.), affirmed *per curiam*, 347 U.S. 521 (75-85%); *United States* v. *Grinnell Corp.*, 384 U.S. 563 (87%).

Tail had a monopoly position in the broader geographic market; in addition it necessarily held a monopoly in each town it served (A. 87).[88]

Otter Tail is also dominant in the subtransmission of power in its area (see pp. 12-15, *supra*). Its extensive network was built to deliver power to the 465 individual monopoly markets in which it was lawfully franchised. It would be socially and economically wasteful for other power suppliers to duplicate those facilities (A. 35, 92-94, 99);[89] the same economic and environmental factors prevent most of the towns in Otter Tail's service area from building their own subtransmission facilities to connect with power suppliers (A. 99-100). For example, Otter Tail has the only subtransmission facilities reaching Elbow Lake and Hankinson. Colman and Aurora, however, are fortunate enough to be within reach of distribution cooperative substations and subtransmission lines, and thus they are able to avoid the effect of Otter Tail's dominance (A. 96-97).

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[88] Otter Tail's contention (Br. 74) that its share of the relevant market was 28.9 percent is erroneously premised upon the inclusion in the relevant market of non-competing retail sales by Northern States, the cooperatives and the Bureau of Reclamation and on the measurement of market shares on the basis of kilowatt hours.

[89] Cf. *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25, and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266, 277, making the same observation with respect to rail lines.

B. Otter Tail Refused to Deal and Invoked Restrictive Provisions in Its Contracts With Other Suppliers In Order to Preserve Its Monopolies.

This Court has stated: "The anti-trust laws are as much violated by the prevention of competition as by its destruction. * * * It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *United States* v. *Griffith*, 334 U.S. 100, 107. See also *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 154. Utilities enjoying monopoly positions are, except to the extent the antitrust laws have been expressly or impliedly displaced, subject to the same restrictions as otherwise lawful monopolists (see pp. 40-45, *supra*). And it is well established that a monopolist cannot refuse to deal or discriminate in its dealings with its customers for the purpose of extending or preserving its monopoly. *Lorain Journal Co.* v. *United States*, *supra*, 342 U.S. at 154; *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 375; *United States* v. *Colgate & Co.*, 250 U.S. 300, 307. Nor may a monopolist obtain enforcement of agreements not to compete which are designed to preserve or extend its monopoly. *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 119. In addition, even where monopolization has not been achieved because the defendant has not acquired monopoly power, an anticompetitive attempt to monopolize is itself a violation of Section 2. See, *e.g.*, *Swift and Company* v. *United States*, 196 U.S. 375, 396;

American Tobacco Co. v. *United States*, 328 U.S. 781, 785, 809; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 430-432 (C.A. 2); *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459, 474-475 (C.A. 9). Under these settled principles, Otter Tail violated Section 2 of the Sherman Act in suppressing competition from the proposed or existing municipal systems seeking to replace it.

1. *Otter Tail's admitted purpose in refusing to wholesale or wheel power to competing retail systems is to suppress their competition.* A community contemplating not renewing Otter Tail's retail franchise when it expires has two practical choices. First, it can itself undertake on a small scale the generation, transmission, and distribution of power. The construction of small, isolated electric power systems not interconnected with other utilities, however, is not an economically sound method of supplying small towns with electricity. See *Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S. 515, 517-520 and n. 3. Second, the community can establish a municipal distribution system to retail power purchased at wholesale from bulk suppliers.[60] This is what the towns involved in the present case proposed to do

[60] Municipalities frequently combine the two alternatives, generating all or part of their base loads and obtaining additional and backup power at wholesale through interconnections. Elbow Lake, with the assistance of the Federal Power Commission, ultimately succeeded in supplementing its own generating facilities through an interconnection with Otter Tail.

(A. 50-86). To operate in this fashion, however, arrangements must be made for the delivery of wholesale power. But since—at least with respect to Elbow Lake and Hankinson—Otter Tail owns the subtransmission lines over which the wholesale power must move and has refused either to wholesale or wheel power, the towns are economically isolated and thus unable to compete effectively with Otter Tail.

There can be no doubt on this record as to the basis for Otter Tail's refusals to deal. There are no engineering factors preventing Otter Tail from selling at wholesale or wheeling power to the towns and no expansion of Otter Tail's facilities would be necessary (see pp. 18-19, *supra*). Rather, as revealed in Otter Tail's answer below (A. 20-21), the refusals to deal are for the sole purpose of preventing municipal systems from ousting it as the retail distributor of electric power in towns which it currently serves. Moreover, the company acknowledges the role that its dominance in subtransmission plays in suppressing competition from municipalities.[61]

2. *Refusals to deal by a monopolist for anticompetitive purposes are prohibited by Section 2 of the*

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[61] On this matter, Otter Tail's chief executive testified (A. 806):

> By not making our facilities available to communities that want to use them in order to leave us as a retail supplier, we then will require that they consider alternative sources of supply, and these alternative sources of supply are not normally as readily available to them as would be Otter Tail facilities, and therefore, they seek to obtain the usages of our facilities.

Sherman Act. Refusals to deal in one market (here, the wholesaling or wheeling of power) for the purpose of maintaining a monopoly in another (here, the retail distribution of power) have long been condemned. *Lorain Journal Co.* v. *United States, supra; Eastman Kodak Co.* v. *Southern Photo Materials Co., supra; United States* v. *Colgate & Co., supra; United States* v. *Pacific & Arctic Railway & Navigation Co., supra; United States* v. *Klearfax Linen Looms*, 63 F. Supp. 32 (D. Minn).[42]

In *Lorain Journal*, a newspaper which had previously enjoyed an almost total monopoly in the dissemination of news within a community had refused to carry advertisements of merchants who advertised over a new radio station which was then competing with the newspaper. The Court held that the newspaper's use of its monopoly "to destroy threatened competition" violated Section 2 of the Sherman Act. 342 U.S. at 154. In *Eastman Kodak*, a manufacturer of photographic supplies, which sold both at wholesale and at retail, was held to have violated Section 2 when it refused to sell to a competing wholesaler except at retail prices in order to perpetuate its monopoly. 273 U.S. at 368-370, 375. And in *Klearfax*, a monopoly producer of linen rug material violated Section 2 by refusing to sell to a

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[42] See also *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F. 2d 484 (C.A. 1), certiorari denied, 344 U.S. 817; *Banana Distributors, Inc.* v. *United Fruit Co.*, 162 F. Supp. 32, 37 (S.D.N.Y.).

firm which had bid against it for government business."

Otter Tail's refusals to wholesale or wheel power are analogous to the practices found illegal in the above cases. In each instance, the purpose of its refusals to wholesale or wheel power was to preserve or extend its monopoly by suppressing competition in the retail market. Otter Tail's conduct is also similar to the conduct challenged in *United States* v. *Pacific & Arctic Railway & Navigation Co.*, 228 U.S. 87. In that case, the Court sustained an indictment charging that a company with monopoly control over rail access to certain markets from a port had violated Section 2 by seeking to monopolize a water route to the port by refusing to enter into through routes and joint rates with competing steamship companies, and by imposing discriminatorily high charges on traffic handled by its competitors.

Otter Tail's conduct is also illegal under the antitrust principle that a firm may not use its strategic dominance over a facility controlling access to a market for the purpose of maintaining its monopoly by shutting out potential competitors. *United States* v. *Terminal Railroad Association*, 224 U.S. 383; *Associated Press* v. *United States*, 326 U.S. 1. In *Terminal Railroad*, a group of railroads acquired for

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[48] In *United States* v. *Colgate & Co.*, *supra*, the Court dismissed an indictment based upon a refusal to deal by a manufacturer of soaps and toilet goods in what was then a highly competitive industry. But the Court carefully noted that refusals to deal are lawful only "[i]n the absence of any purpose to create or maintain a monopoly." 250 U.S. at 307.

their own exclusive use all of the railroad bridges into St. Louis and thereafter denied their competitors access to the St. Louis market. And in *Associated Press*, a cooperative news association promulgated by-laws which permitted member newspapers to prevent competitors from joining the association, thus denying such competitors access to the association's news service. In both cases, the exclusion of competitors was held to violate the Sherman Act.

Otter Tail contends (Br. 75-78) that these cases are inapplicable here since they involved concerted, rather than unilateral, activity. But Section 2 of the Sherman Act, under which Otter Tail was charged, applies to individual as well as concerted conduct. And, since the matters condemned by Section 2 are in large measure merely the end products of concerted conduct which violates Section 1 (*United States* v. *Griffith*, *supra*, 334 U.S. at 106; *Standard Oil Co.* v. *United States*, *supra*, 221 U.S. at 61), the rationale of the *Terminal Railroad* and *Associated Press* decisions applies to a monopolist's conduct denying competitors access to markets or supplies. The decisions are thus controlling here.

Finally, there is nothing unusual in requiring a monopolist to supply goods or services which enable others to compete with it. In *Terminal Railroad*, for example, the railroads involved were required to make their exclusive bridge facilities available to competitors, and in *Associated Press* the news association was required to sell news to nonmember newspapers that competed with its members. Moreover, the *East-*

man Kodak, *Klearfax* and *Pacific & Arctic* cases all stand for the proposition that a monopolist is not permitted to refuse to deal with its competitors for anticompetitive purposes.

8. *Otter Tail further abused its monopoly power by invoking provisions in its wheeling contracts with other suppliers to deny municipal systems access to such suppliers.* In refusing to wheel power for the Bureau of Reclamation and generation and transmission cooperatives to proposed municipal systems threatening to displace it, Otter Tail invoked provisions of its wheeling contracts with the Bureau and the cooperatives which it interprets as relieving it of any duty to wheel power to municipalities served at retail by Otter Tail at the time the contracts were entered into (see pp. 19-20, *supra*). Otter Tail insisted on the restrictive provision in its contract with the Bureau and has incorporated a similar provision in its standard form for contracts with cooperatives (A. 98-99, 128); without the provisions, Otter Tail in many instances would be contractually bound to wheel power to proposed or existing municipal distribution systems (A. 99, 127).

The restrictive provisions essentially allocate the geographic markets represented by the towns served by one or the other of the contracting parties and thus are, as the district court held, "in reality territorial allocation schemes" (A. 43) designed to suppress competition. As such they are unlawful on two grounds. First, as clearly shown by the record in this case, the purpose of the restrictions was to pre-

vent towns currently served by Otter Tail from obtaining alternative sources of power after Otter Tail's franchises expired and from establishing their own municipal systems. The allocation was, therefore, one of the anticompetitive means by which Otter Tail sought to preserve its monopoly position, as the district court expressly found (A. 129-130). In addition, as the district court observed, agreements of this kind are illegal *per se*. *United States* v. *Topco Associates*, 405 U.S. 596. Indeed, territorial allocations among competing utilities have been held illegal both under the Sherman Act (*Montana-Dakota Utilities Co.* v. *Williams Electric Coop.*, 263 F. 2d 431 (C.A. 8); *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. 2d 552 (C.A. 4), certiorari denied, 340 U.S. 906) and under the common law. *Gibbs* v. *Baltimore Gas Co.*, 130 U.S. 396, 399.

Otter Tail erroneously asserts (Br. 79-80) that the restrictions are little more than ancillary restraints to a mutual lease of facilities and thus are not invalid. Whether or not the provisions were ancillary, Otter Tail, as a monopoly supplier, is not free to insist upon conditions designed to suppress competition for the purpose of preserving or extending its monopoly. By using its dominant position to secure agreements solely to deny competitors access to wholesale power, Otter Tail violated Section 2 of the Sherman Act quite apart from the established *per se* rule against territorial allocations. See *United States* v. *Griffith*, *supra*, 334 U.S. at 107-108; *Schine Chain Theatres* v. *United States*, *supra*. In *Schine*, a mo-

nopoly theatre chain exacted agreements not to compete for long terms of years from theatre owners whose theatres it had bought. This Court held that the agreements (which were, of course, "ancillary" to the sales contracts) were additional weapons in the monopolist's arsenal of power by which it sought to extend its monopoly and were thus illegal. 334 U.S. at 119. In any event, wheeling does not involve the lease of facilities; indeed, Otter Tail's agreement with the Bureau (para. 39(a), A. 1091) expressly provides that no lease of facilities is intended.[44]

C. Otter Tail Improperly Used Litigation To Suppress Competition.

Otter Tail's attempts to preserve its monopoly were not limited to refusals to deal and the invocation of

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[44] The fact that some of the restrictive provisions were contained in a contract with the Bureau of Reclamation does not insulate them from attack under the Sherman Act, since government contracting officers do not have the power to grant immunity from the Sherman Act. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-226. Whether a restrictive provision in a government contract with a private party is immune from attack under the Sherman Act depends upon the nature of the contract and whether the restriction is essential to the achievement of the statutory objectives of the program pursuant to which the contract was entered into. Compare *Alabama Power Co.* v. *Alabama Electric Coop.*, 394 F. 2d 672 (C.A. 5), certiorari denied, 393 U.S. 1000, with *Hecht* v. *Pro-Football, Inc.*, 444 F. 2d 931 (C.A.D.C.), certiorari denied, 404 U.S. 1047. The restrictive provisions in Otter Tail's contract with the Bureau obviously was not essential to the distribution of Bureau power. Indeed, it operates as a hinderance to that objective and was agreed to by the Bureau only at Otter Tail's insistence (see p. 20, *supra*).

wheeling contract provisions preventing other suppliers from selling power to proposed municipal systems; it compounded these anticompetitive activities by systematically initiating or supporting litigation designed to sap the resources of the small communities which had challenged its dominance and to prevent or delay their establishment of municipal distribution systems. As we have noted, the pendency of litigation challenging any aspect of proposed municipal electric systems prevents the sale of electric revenue bonds by which such systems are financed. Thus, although all of Otter Tail's suits were unsuccessful on the merits as a matter of law,[46] they

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[46] Only the initial suit in Aurora was partially successful in that the town was prevented from purchasing its own revenue bonds after a scheduled bond sale had been frustrated by Otter Tail's suit. See our full discussion of the various lawsuits at pp. 21-27, *supra*.

Otter Tail's assertion (Br. 66) that three of its suits (the two Aurora suits and the Hankinson suit) were at least partially successful is misleading. The mandamus action in Aurora (virtually identical to Otter Tail's unsuccessful action in Colman) was "successful" only because the town found it more expeditious to hold the election (at which the proposal to repeal authorization of the municipal system was defeated) than to defend the action. The Hankinson suit was "successful" at the trial level, but was reversed and dismissed on appeal.

Otter Tail's attempt to dignify its second Elbow Lake suit by pointing out that the town was unsuccessful in suing Otter Tail for damages resulting from the suit (Br. 17, 67) is also misleading. In fact, the town's suit merely involved the interpretation of an undertaking furnished by Otter Tail in connection with its unsuccessful suit. *Village of Elbow Lake* v. *Otter Tail Power Co.*, 281 Minn. 43, 160 N.W. 2d 571.

succeeded as a matter of anticompetitive tactics in delaying the establishment of municipal systems for substantial periods.

The use of litigation for the purpose of suppressing competition is a violation of the Sherman Act, whether attempted collectively or by a monopolist. Compare *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 192-196, and *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 515, with *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172. See also *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F. 2d 416 (C.A. 10); *Lynch* v. *Magnavox Co.*, 94 F. 2d 883 (C.A. 9). As this Court recently pointed out in *California Motor Transport*, the constitutionally guaranteed right of access to the courts "does not necessarily give [litigants] immunity from the antitrust laws" and "may not be used as the means or the pretext for achieving 'substantive evils' ", such as violations of the antitrust laws. 404 U.S. at 513, 515. The Court there held (*id.* at 511) that such litigation loses its constitutional protection under the "sham" exception established in *Eastern Railroad Presidents Conference* v. *Noerr Motor Feright, Inc.*, 365 U.S. 127, 144. In *Noerr*, the Court recognized that (*ibid.*):

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor and the application of the Sherman Act would be justified.

In the present case, the litigation initiated or procured by Otter Tail was a "sham" within the meaning of *California Motor Transport* and *Noerr*, designed not to remedy alleged deficiencies in proposed sales of revenue bonds or in bidding procedures for construction contracts, but solely to suppress competition. This purpose was plainly revealed by Otter Tail's frequent settlement offers conditioning abandonment of its suits on the renewal of its franchises, rather than on the remedying of the alleged defects charged in the suits. Indeed, Otter Tail's own characterization of its litigation as being essentially "political in nature" (Br. 18, 64) confirms that the real object of the suits was not the merits, but was to force abandonment of the competing proposed systems. This Court held in *California Motor Transport*, however, that such abuses of administrative or judicial processes cannot acquire immunity from the antitrust laws by "seeking refuge under the umbrella of 'political expression.'" 404 U.S. at 513.[46]

The applicability of the principles expressed in *California Motor Transport* are not confined to situa-

[46] Contrary to Otter Tail's contention (Br. 64-65), the district court's condemnation of Otter Tail's conduct is consistent with this Court's decision in *Noerr* and *United Mine Workers* v. *Pennington*, 381 U.S. 657, holding that the Sherman Act does not prohibit the use of political processes to secure the passage or enforcement of laws to suppress competition. The complaint in this case did not question Otter Tail's right to campaign in municipal elections concerning the establishment of municipal electric systems, and the district court expressly recognized that such activities cannot be the subject of Sherman Act liability (A. 41).

tions where one competitor seeks to deny another access to the courts. Firms may violate the antitrust laws by attempts to extend their monopoly advantage: (1) through unjustified coercive litigation (*e.g., Kobe, Inc.* v. *Dempsey Pump Co., supra*),[87] (2) by threats of such litigation (*Lynch* v. *Magnavox Co., supra*), (3) by a collective program of litigation designed to exclude competing products from the market (*United States* v. *Singer Manufacturing Co., supra; Lynch* v. *Magnavox, supra*), (4) by the use of a fraudulently procured patent (*Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp., supra*), or (5) by misrepresentation of facts to a regulatory agency (*Woods Exploration & Producing Co.* v. *Aluminum Company of America*, 438 F. 2d 1286 (C.A. 5), certiorari denied, 404 U.S. 1047). Nor is this list exhaustive. "[T]here are many other forms of * * * practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," including "a pattern of baseless, repetitive claims * * * [that] leads the factfinder to conclude that the * * * judicial processes have been abused."

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[87] *Virtue* v. *Creamery Package Co.*, 227 U.S. 8, is not to the contrary as suggested by Otter Tail (Br. 67, n. 44). The Court there held only that on the particular facts of that case no illegal agreement in violation of Section 1 of the Sherman Act had been established. Moreover, the development of the law since that decision suggests that it is of doubtful vitality as a precedent today. See *United States* v. *Singer Manufacturing Co., supra; California Motor Transport Co.* v. *Trucking Unlimited, supra; Slick Airways, Inc.* v. *American Airlines, Inc.*, 107 F. Supp. 199, 213-214 (D. N.J.), appeal dismissed, 204 F. 2d 230 (C.A. 3).

California Motor Transport Co. v. *Trucking Unlimited*, *supra*, 404 U.S. at 513.

The district court's findings in this case plainly disclose such a pattern, for each town which attempted to establish its own system found itself enmired in litigation sponsored by Otter Tail. The litigation followed the same general format from town to town, presented basically the same principal issues, always achieved substantial delays, was unmeritorious save for one minor issue, and was sponsored for the purposes of suppressing competition from the proposed systems.

D. Otter Tail's Conduct Was Not Justified.

Throughout this litigation, Otter Tail has contended that its conduct is justified by its right to protect its system from erosion (A. 18, 21, 45-46, 154; J.S. 28-29; Br. 82).[**] But the findings of the district court demonstrate that there is in fact no

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[**] The same contentions were made in Otter Tail's oppositions to Elbow Lake's application to the Federal Power Commission for emergency and permanent interconnections (J.S. App. A-130 to A-131; A. 191). Otter Tail points out (Br. 10) that in ordering a permanent interconnection, the Commission acknowledged that Otter Tail's fears of erosion might be well founded if communities were to embark on unsound municipal electric systems ventures expecting "to be rescued by overly-generous interconnection terms" (A. 191). But, as the final judgment of the district court expressly recognizes (A. 209), the Commission has full authority over interconnection terms and thus can assure that such terms are not "overly-generous" to the towns. And, in light of the Commission's remarks, a town would have no basis for anticipating "overly-generous" terms.

such threat. Neither the Bureau of Reclamation nor other utilities in the area have substantial surplus generating capacity available (A. 111-123) for wholesaling to municipal systems and they do not compete for retail markets (A. 88-91). And Otter Tail has enjoyed continuous growth both through the acquisition of municipal electric systems and through expansion of its existing electric load as a result of more intensive power use by existing customers and the acquisition of new industrial and commercial customers (A. 123-126).

In any event, the right of a business to survive has never justified attempts to suppress the right of others to compete. The Sherman Act is intended to assure that Otter Tail, like all other enterprises, will protect itself against the loss of business by operating with superior service, lower costs and greater efficiency. *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1. Otter Tail's "self preservation" justification would substitute anticompetitive use of the dominant economic power shown on this record for competition. But as this Court has pointed out, "the promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 375.

Under these same principles, Otter Tail's claim (Br. 72-74) that its attempt to suppress the competing systems were legitimately defensive also fails. The case upon which it primarly relies—*Union Leader Corp.* v. *Newspapers of New England, supra* —does not sanction such suppression. It simply

recognizes that an attempt to enter "into a monopoly market without more does not taint *otherwise legal conduct*" and that, by the same test, the law does not "circumscribe conduct *which might otherwise* be justified as defensive" (*emphasis added*). 284 F. 2d at 587. In the present case, as we have shown, Otter Tail went far beyond legitimate competitive practices, such as the offering of better rates and service and the persuasion of the electorates not to authorize proposed municipal systems. It engaged in affirmative acts of suppression after the communities had decided to establish municipal electric systems. Such conduct is not justifiable under Section 2 of the Sherman Act.

Finally, the fact that Elbow Lake, Colman and Aurora eventually succeeded in establishing municipal electric systems does not excuse Otter Tail's conduct. In each instance, the towns were required to overcome substantial barriers placed in their way by Otter Tail in its attempt to preserve its monopoly positions. That the towns were able to overcome the ordeals does not legalize Otter Tail's conduct and is no assurance that the company will refrain from such conduct in the future with respect to other towns in its service area.

III. NEITHER THE FEDERAL POWER COMMISSION'S LIMITED AUTHORITY TO ORDER INTERCONNECTIONS AND SALES OF ELECTRIC ENERGY, NOR ITS LACK OF AUTHORITY TO ORDER WHEELING, BARS THE GRANTING OF EFFECTIVE RELIEF IN THIS ANTITRUST CASE

In Point I, *supra*, we showed that in enacting the Federal Power Act Congress did not expressly or impliedly repeal the independent application of the antitrust laws to the electric power industry (see pp. 45-54, *supra*). We now contend that neither the Federal Power Commission's limited authority under Section 202(b) of the Federal Power Act, 16 U.S.C. 824a(b), to order interconnections and sales of electric energy under certain circumstances, nor its lack of authority under Section 202(b) to order wheeling, bars the federal courts, in remedying specific antitrust violations, from enjoining a utility from refusing to wholesale or wheel power.

As we have noted (p. 50, *supra*), the original version of Title II of the Federal Power Act introduced before Congress would have established a much broader regulatory scheme than was enacted. Specifically, Section 203(b) of the initial bill would have empowered the Commission on its own motion to direct an electric utility to extend its facilities, to interconnect with other utilities, to permit others to use its facilities, and to "sell energy to, purchase energy from, transmit energy for, or exchange energy with, one or more persons." S. 2796 and H.R. 5423,

74th Cong., 1st Sess.[69] The bill, however, was substantially modified in the Senate (see S. Rep. No. 621, 74th Cong., 1st Sess.), and further changes were effected in the House. See H. Rep. No. 1318, 74th Cong., 1st Sess.[70] In the course of these revisions, the common carrier provision of the original bill was deleted and the broad authority which would have been given the Commission under the original Section 203(b) was pared down to the far more limited authority now embodied in Section 202(b).

The modifications of the original bill were made in response to criticism of the bill by the electric power industry.[71] With respect to the common carrier provision, the Senate report stated (S. Rep. No. 621, *supra*, p. 19):

> While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric

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[69] Section 202(a) of the initial bill would have made utilities common carriers by requiring them to sell or wheel electric energy to any person on reasonable request.

[70] The House Report describes changes in the bill giving the Commission jurisdiction to order interconnections between interstate and intrastate utilities, and expressly denying the Commission power to require enlargement of facilities or to order interconnections where an undue burden would be placed on a utility, but says nothing more. H. Rep. No. 1318, 74th Cong., 1st Sess., p. 28. The Conference Report did not mention Section 202(b), H. Rep. No. 1903, 74th Cong., 1st Sess., and the extensive debates in both chambers did not discuss it.

[71] See excerpts from the Senate and House hearings on the bill set forth at pp. 2-10 of the Addendum to Otter Tail's brief.

> companies. It relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new section 202 (a) (formerly section 203(a)), for the first Federal effort in this direction.

Similarly, the report indicated that the provisions of the old Section 203(b) empowering the Federal Power Commission to require a utility to wheel or extend or improve its facilities had been eliminated so that these matters would be "left to the voluntary action of the utilities" (*ibid.*).

The very preference of Congress to leave matters to the voluntary action of utilities is a strong indication that the displacement of judicial antitrust remedies should not be inferred from the specific provisions that Congress did enact, for it is to the conduct of voluntary commercial relationships that antitrust laws and remedies have traditionally been applied. Indeed, antitrust protection furthers this congressional preference by preventing or remedying anticompetitive obstructions to the operation of the free market in which utilities make voluntary arrangements for interconnection and power supply. Accordingly, as this Court has observed, it cannot lightly be assumed "that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws inapplicable to that industry." *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218.

Moreover, the limited provisions of Section 202 of the Federal Power Act do not, and obviously were not intended to, provide effective relief from conduct violative of the antitrust laws. Under Section 202 (a) of the Act, the Commission is directed to divide the country into regional districts "for the voluntary interconnection and coordination" of electric facilities "[f]or the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources." The Commission is further directed to "promote and encourage such interconnection and coordination." Thus, Congress determined that the primary means for interconnecting and coordinating electric facilities should be voluntary agreements among utilities, entered into with the encouragement of the Commission.

In Section 202(b), Congress gave the Commission limited authority to compel interconnections where voluntary agreements could not be reached. Upon the application "of any State commission or of any person engaged in the transmission or sale of electric energy," [72] the Commission is empowered to di-

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[72] A municipal electric system is a "person" within the meaning of Section 202(b). *Otter Tail Power Co.* v. *Federal Power Commission*, 429 F. 2d 232 (C.A. 8), certiorari denied, 401 U.S. 997; *Florida Power Corp.* v. *Federal Power Commission*, 425 F. 2d 1196 (C.A. 5), reversed on other grounds *sub nom. Gainesville Utilities Department* v. *Florida Power Corp., supra; New England Power Co.* v. *Federal Power Commission*, 349 F. 2d 258 (C.A. 1).

rect a utility subject to its jurisdiction to interconnect with one or more other persons engaged in the transmission or sale of electric energy and to sell energy to or exchange energy with such persons on terms and conditions prescribed by the Commission. Prior to ordering an interconnection and sale or exchange, however, the Commission must find, after appropriate notice and opportunity for hearing, that such action is "necessary or appropriate in the public interest" and will not place an "undue burden" on the utility with which the interconnection is sought. Moreover, the Commission may not require a utility to enlarge its generating facilities under an interconnection order and may not compel the utility to sell or exchange power if the sale or exchange would impair the utility's ability to serve its customers adequately.

Otter Tail asserts (Br. 25-46) that Section 202 (b) grants the Commission the exclusive power to order interconnections and that the district court thus erred in enjoining the company from refusing to sell power at wholesale to municipal systems—an order which has the effect of ordering Otter Tail to interconnect. In our view, Otter Tail misconceives the limited nature of Section 202(b) as well as the purpose and effect of the district court's judgment in this case.

Otter Tail has been found liable in this case not for *bona fide* refusals to interconnect, but for engaging in a series of acts solely for the purpose of suppressing competition from proposed municipal sys-

tems. If, contrary to the district court's findings, Otter Tail's conduct had been based upon any of the many legitimate reasons why a lawful monopolist may refuse to deal—*e.g.*, honest disagreement over prices, undue burden to its system, lack of surplus power, engineering difficulties, a threat to its ability to serve other communities—its refusals to deal presumably would not have violated the antitrust laws. Upon proper application, however, the Commission might nevertheless have ordered interconnections under Section 202(b) if it found that the public interest outweighed the utility's legitimate reasons for resisting the interconnection and that enlargement of facilities or impairment of service to others would not be required.

While Section 202(b) is tailored to provide relief from refusals to interconnect where such refusals are based on grounds which require a balancing of conflicting electrical needs,[73] it does not provide a substitute for the fuller relief which can be ordered by the district courts to remedy anticompetitive practices. In the first place, it is not clear whether a *proposed* municipal system is a "person engaged in the transmission or sale of electric energy" entitled to apply for an interconnection under Section 202(b).[74] Yet it is principally the potential competition

[73] See, *e.g.*, *Gainesville Utilities Department* v. *Florida Power Corp.*, *supra*.

[74] In the *Elbow Lake* proceedings before the Commission (see n. 15, *supra*), Otter Tail contended that Elbow Lake lacked standing under this criterion. The issue became moot,

of proposed municipal systems that Otter Tail suppressed in this case.

Second, proceedings under Section 202(b) are lengthy and expensive and thus beyond the limited resources of many small communities.[75] As we have noted, most interconnections between utilities are effected voluntarily without the need for recourse to formal proceedings before the Commission. To permit Otter Tail to force municipalities to resort to such proceedings under Section 202(b) solely because the municipalities were then being served at retail by Otter Tail, would be to impose an unwarranted burden not borne or shared by other municipalities seeking interconnections. Otter Tail's anticompetitive behavior in this case directly affected several towns and potentially affected many others. The only effective remedy against the conduct is an order prohibiting Otter Tail from engaging in such conduct in the future. Such an order was issued by the district

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however, since the village had become actively engaged in the actual generation, transmission and sale of electricity by the time it filed its amended application for an interconnection with Otter Tail. Thus, in holding that the village was a "person" with standing under Section 202(b), the Commission did not reach the question whether municipalities proposing to engage in the power business could compel interconnections.

[75] Elbow Lake applied to the Commission for an interconnection with Otter Tail in March 1966 (J.S. App. A-120). The Commission's permanent interconnection order was not issued until September 1971—some five and one-half years later—and judicial review proceedings are still pending (see n. 16, *supra*).

court in this case under traditional antitrust principles; it could not have been issued by the Federal Power Commission in a Section 202(b) proceeding involving but a single municipality.

Third, Section 202(b) is obviously wholly ineffective to prevent Otter Tail from initiating litigation having the effect of blocking or delaying the establishment of municipal electric systems. Finally, as the language and legislative history of the statute make clear, the Commission has no authority under Section 202(b) to compel wheeling.[76] See *City of Paris* v. *Kentucky Utilities Co.*, 41 F.P.C. 45, 48-49.

Having contended in the first part of its brief that the limited grant to the Commission under Section 202(b) of authority to order interconnections and sales of power bars the district court from enjoining refusals to wholesale power which violate the Sherman Act, Otter Tail contends in the second part of its brief (Br. 46-63) that the decision of Congress *not* to give the Commission authority under Section 202(b) to order wheeling similarly bars the district court from enjoining refusals to wheel which violate the antitrust laws. But, if, as we have shown, the enactment of a limited regulatory power does not displace traditional antitrust remedies, it follows that the mere refusal of Congress to adopt a par-

[76] In contrast, the Commission may order wheeling on a temporary basis in connection with its authority under Section 202(c) of the Act to order temporary interconnections to meet emergencies. 16 U.S.C. 824a(c).

ticular additional administrative remedy also does not do so. And, specifically, the fact that the Commission was not given administrative authority to order wheeling does not indicate that Congress intended to permit utilities to use their monopoly positions to block competitors' access to wholesale power. Cf. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17.

In *Idaho Power*, a private utility was issued a license by the Federal Power Commission under Section 4(e) of Part I of the Federal Power Act, 16 U.S.C. 797(e), to construct and operate a hydroelectric project, but, as a condition of the license, the utility was required to wheel power for the Bureau of Reclamation which was generated at Bureau projects in the area. The utility contended that since the Commission could not order an interconnection with the United States under Section 202(b) of the Act, the wheeling condition to the license was unlawful. In rejecting this contention and upholding the condition to the license, this Court held that "the limitation on the new powers conferred by Part II" of the Federal Power Act could not be construed as a "repeal by implication of the powers over licensees that are deeply engrained in Part I of the Act and put there by the Congress for the purpose of protecting the public domain." 344 U.S. at 24. Similarly, the absence of Commission power to order wheeling in Part II of the Federal Power Act should not be construed as an implied displacement of the "deeply

engrained" antitrust policies and remedies embodied in the Sherman Act."

Seventeen Investor-Owned Electrical Utilities argue as *amici curiae* (17 Am. Br. 22-24) that the so-called Keating Amendment to the annual appropriations bills of the Bureau of Reclamation is evidence of Congress' determination that private utilities should not be forced to wheel government power under any circumstances. Far from supporting this conclusion, however, the provision—which prohibits

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" The repeated failure of Congress to amend Part II of the Federal Power Act to add wheeling authority, documented by Otter Tail (Br. 53-57; Addendum 28-51), similarly should not be construed to foreclose Sherman Act remedies by implication. More in point are the numerous proposals which have been introduced in Congress, but not adopted, to confer authority on the Commission to grant exemptions from the antitrust laws for certain narrow categories of conduct. For example, S. 3136, 89th Cong., and S. 683, 90th Cong., would have exempted from the antitrust laws all contracts approved by the Commission dealing with the sale, exchange, interconnection, pooling, coordination, or joint use of facilities for generating or transmitting electricity. See Hearing on Amendment to Federal Power Act (Antitrust Review) before the Senate Commerce Committee, 89th Cong., 2d Sess. (on S. 3136), and 90th Cong., 1st Sess. (on S. 683). Congress has also recently considered bills to establish antitrust exemptions for Commission-approved actions of regional councils established to coordinate power requirements and electric systems. See, *e.g.*, Section 404(c) and (d), H.R. 1486, 92d Cong., 1st Sess.; Section 407(e), H.R. 6970, 92d Cong., 1st Sess.; Section 10(c), H.R. 6971, 92d Cong., 1st Sess.; Section 11(f), H.R. 6972, 92d Cong., 1st Sess. See generally Hearings on Power Plant Siting and Environmental Protection before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 92d Cong., 1st Sess.

the Bureau of Reclamation from constructing its own transmission lines unless it is unable to arrange to have its power wheeled by private utilities (see 17 Am. Br. 23)—merely expresses a congressional preference for the use of private transmission lines where available, thus avoiding the public expense and environmental disadvantages of duplicate transmission facilities. See 97 Cong. Rec. 4645 (remarks of Rep. Keating). While it is true that Congress expected that wheeling arrangements between the Bureau and private utilities would be negotiated voluntarily, there is nothing to indicate that Congress intended to immunize from the antitrust laws refusals to wheel government power solely for anticompetitive reasons. From the earliest days, the antitrust laws have protected municipal purchasing. See, *e.g.*, *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.A. 6), affirmed, 175 U.S. 211. The application of those laws in this case is consistent with the Keating Amendment and furthers Congress' established policy of giving municipalities preferential rights to government power. See 16 U.S.C. 825s.

The seventeen *amici* companies also point out (17 Am. Br. 12-18) that government policies enable publicly generated power to be furnished to consumers at lower cost than that of power generated by investor-owned utilities. But it does not follow from this that Congress intended to deny to eligible communities of consumers the right (protected by the antitrust laws) to decide for themselves whether they wish to be the beneficiaries of available low-cost publicly generated power, or intended to empower the

firms previously supplying them to make that choice for them.

Finally, contrary to Otter Tail's suggestion (Br. 57-58), the effect of the decision in this case will not be to convert electric utilities into common carriers. Common carriers are under a duty to serve all without discrimination. The duty to serve imposed by the antitrust laws, however, arises only in the limited situation where monopoly power is exercised to suppress competition by denying competing systems access to wholesale power which could be transmitted by the dominant system without undue burden. If Otter Tail's refusals to wheel had been based on a legitimate ground—such as the absence of excess capacity on its transmission lines or an honest disagreement over wheeling charges—the Sherman Act presumably would not have been violated. A willful attempt to suppress competition, however, is another matter. The fact that utility companies, like all but a few transportation and communications firms, are not common carriers does not give them a legal right to obstruct or destroy their competitors.

IV. THE DISTRICT COURT'S DECREE MAKES PROPER PROVISION FOR THE REGULATORY RESPONSIBILITIES OF THE FEDERAL POWER COMMISSION

The district court's decree neither encroaches upon the responsibilities of the Federal Power Commission nor adds to its powers. It is carefully framed "so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival."

Ethyl Gasoline Corp. v. *United States*, 309 U.S. 436, 461; see also *Ford Motor Co.* v. *United States*, 405 U.S. 562. And it should properly be read in the light of the issues litigated, the offenses found and the fact that the court has expressly reserved jurisdiction to construe or modify its provisions (A. 210).[78]

Otter Tail contends that the district court's amended judgment is repugnant to the regulatory scheme enacted by Congress in that, while the judgment recognizes the Commission's authority to pass on the terms and conditions of interconnections, it does not authorize the Commission to determine whether an interconnection should be effected in the first instance (Br. 33). If the Commission were authorized by the Federal Power Act to review every interconnection agreement entered into between electric systems and disapprove the interconnection in the first instance if it concluded that the interconnection was not in the public interest, Otter Tail's contention might be more persuasive. In fact, however, the Commission's authority in such instances is limited to a review of the reasonableness of the terms and conditions of

[78] Contrary to Otter Tail's contention (Br. 82-83), Paragraph IV of the decree (A. 208-209) does not invalidate in their entirety Otter Tail's interconnection and wheeling contracts with the Bureau of Reclamation and the rural electric cooperatives. Although the decree might be read in the abstract to strike down the agreements, it was clearly intended and should be construed to strike down only those provisions which were challenged and found unlawful by the district court —*i.e.*, the provisions relieving Otter Tail of any duty to wheel power to towns which it served at retail (see A. 126-129).

interconnection under Sections 205 and 206 of the Act, 16 U.S.C. 824d, 824e—precisely the authority recognized by the district court.

The effect of the judgment in this case is thus to permit such wholesaling and wheeling arrangements to be made between Otter Tail and municipal electric systems as would have been made voluntarily but for Otter Tail's anticompetitive behavior in violation of Section 2 of the Sherman Act. Far from thwarting the regulatory scheme embodied in the Federal Power Act, the district court's decision advances the dominant policy of that scheme, which is to achieve the maximum coordination of electric facilities through voluntary interconnection agreements. See Section 202(a) and p. 89, *supra*. The Commission's regulatory responsibilities remain fully intact, since any interconnection arrangements made between Otter Tail and a municipality pursuant to the judgment are subject to the same review authority that the Commission possesses under the Federal Power Act with respect to voluntary interconnections.

Specifically, Paragraph V of the amended decree (A. 209), inserted at Otter Tail's request (A. 185), provides that Otter Tail is not compelled to furnish wholesale service or to wheel to municipalities, "except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission." This language accurately reflects the Commission's jurisdiction under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d, 824e, to review all rates

or charges "for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission." 16 U.S.C. 824d(a)." It is appropriate for a district court to permit a regulatory agency to consider certain specific issues involved in implementing the court's judgment that are within the jurisdiction of the agency. In *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 137-139, for example, this Court recognized that the Federal Power Commission would have to pass upon various aspects of the divestiture there ordered, such as the terms of the new gas contracts and the grant of operating authority to the divested company. Paragraph V thus reflects a discriminating use of the district court's equity powers which reinforces the complementary roles of the antitrust remedy and the administrative scheme.

Finally, the district court retains jurisdiction "enabling any of the parties * * * to apply * * * at any time for such further orders and directions * * *" necessary or appropriate for construction, modification or enforcement of the decree (A. 210). If in

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" Under 16 U.S.C. 824d(c), utilities must file with the Commission all schedules and contracts showing rates or charges for transmissions or sales subject to the Commission's jurisdiction. Under 16 U.S.C. 824(b), the Commission's jurisdiction extends to all transmissions and sales at wholesale of electric energy in interstate commerce. As a result, even though the Commission has no authority to compel wheeling, it does have jurisdiction over the charges imposed for wheeling. Contrary to Otter Tail's assertion (Br. 63), the judgment thus does not enlarge the Commission's jurisdiction with respect to wheeling.

any particular instance compliance with the decree by Otter Tail threatens to impair its ability to meet its obligations as a public utility, it can apply to the district court under this provision for appropriate relief.

In summary, the district court's decree enjoined the specific practices which Otter Tail used to suppress competition in violation of well-known antitrust standards governing voluntary behavior. Otter Tail cannot now complain that the decree imposes restrictions on it not placed on other utilities; otherwise lawful conduct used to carry out an unlawful purpose is properly enjoined in Sherman Act decrees. See, *e.g.*, *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 461; *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 725-728; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 178. Having engaged in a deliberate attempt to suppress competition from a few small proposed systems in its area, it is subject to the principle that "those caught violating the Act must expect some fencing in." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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